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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIE MAE PAYNE, *et al.*, *Petitioners*,

v.

TRAVENOL LABORATORIES, INC. and
BAXTER LABORATORIES, INC., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 1982

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QUESTIONS PRESENTED

1. Do this Court's holdings in General Telephone Co. of the Southwest v. Falcon, U.S. , 72 L.Ed. 2d 740 (1982) and East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977), requiring the courts to consider Rule 23 questions in the light of the specific facts and circumstances of the cases before them rather than by reference to abstract rules of thumb, apply to the decertification of part of a class?

2. Where the black female plaintiffs in a case brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 possessed the same interests and suffered the same injury as black males, and where they proved to the satisfaction of both courts below that black men had been discriminated against in precisely the same manner as black women, does the mere fact that the black female plaintiffs had also

brought a sex discrimination claim disqualify them from continuing to represent black males and justify the exclusion of black males from the individualized seniority relief otherwise mandated by Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and from the monetary relief otherwise mandated by Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)?

3. Where black females successfully challenged the exclusion of women from a traditionally-male entry-level job and where the challenge foreseeably had no adverse effect on any black male incumbent in that job, but where future black male applicants would have to compete with black female applicants for future positions in that job, does the mere risk of increased future job competition create the type of conflict of interest which under Rule 23(a)(4) would bar black females from representing and obtaining relief for black males on the issues of racial discrimination common to all blacks?

4. Where the original black male plaintiff withdrew from the case for personal reasons after the certification of a class which included all blacks, should that class have been treated as a continuing entity under Sosna v. Iowa, 419 U.S. 393 (1975) and Franks? If not, should the black males about to be decertified from the class have been provided with notice so that a new representative could intervene and protect them from the possible prejudice---in light of requirements of administrative exhaustion under Title VII, statutes of limitations, etc.---of having to file a new and duplicative lawsuit to enforce their rights?

1. Petitioners:

   Willie Mae Payne
   Birdie Lee Griffin
   Delilah Cherry
   Actual and potential class members who applied for employment at the defendants' plant in Cleveland, Mississippi or who were employed there.

2. Respondents:

   Travenol Laboratories, Inc.
   Baxter Laboratories, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

WILLIE MAE PAYNE et al.,

Petitioners,

v.

TRAVENOL LABORATORIES, INC., and
BAXTER LABORATORIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Willie Mae Payne et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered on April 22, 1982.

OPINIONS BELOW

The April 22, 1982 opinion of the Court of Appeals is reported at 673 F.2d 798, and is reproduced in the separate Appendix at App. 1a-165a. The July 7, 1982 order of the Court of Appeals denying rehearing is reproduced at App. 166a-167a. The November 16, 1972 order of the district court certifying a class including black males is reproduced at App. 168a-169a. The December 20, 1974 order of the district court decertifying black males from the class is reproduced at App. 170a-172a. The February 19, 1976 opinion of the district court on liability is reported at 416 F.Supp. 248, and is reproduced at App. 173a-206a. The December 8, 1976 opinion of the district court declining to change the class definition in light of the results of trial is reported at 74 F.R.D. 14, and is reproduced at App 207a-221a. The accompanying Order is reproduced at App. 222a-224a.

The January 6, 1978 decision of the Fifth Circuit on the first appeal in this case is reported at 565 F.2d 898 and is reproduced at 225a-231a. The March 23, 1978 Order of the Fifth Circuit denying rehearing and denying rehearing en banc is reproduced at 232a. The January 24, 1979 order of the district court again declining to make any changes in the class definition is reproduced at App. 233a-234a. The July 24, 1980 Magistrate's Report and Recommendation on further injunctive relief, recommending a denial of individualized injunctive relief to black males because of their exclusion from the class, is reproduced at App. 235a-262a. The August 18, 1980 order of the district court adopting the Magistrate's Report and Recommendation is reproduced at App. 264a. The August 18, 1980 Decree is reproduced at 265a-279a.

JURISDICTIONAL STATEMENT

The opinion and judgement of the Court of Appeals were entered on April 22, 1982. App. 1a. Petitioners timely filed a petition for rehearing and a suggestion for rehearing en banc, and respondents timely filed a petition for rehearing. All petitions were denied on July 7, 1982. App. 166a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES INVOLVED

The relevant portions of Rule 23, F.R. Civ.P., are set forth at App. 280a.

STATEMENT OF THE CASE

This case was filed in March 1972 by a black male and two black females, alleging racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and of 42 U.S.C. § 1981. On November 16, 1972, the lower court certified a class of

all black employees and applicants for employment.

On May 1, 1973, plaintiffs amended their complaint to allege sex discrimination in addition to racial discrimination. A week later, the sole black male plaintiff was allowed to withdraw because of a change in his religious views. On December 20, 1974, the lower court entered an order excluding black males from the class although they had then been members of the class for more than two years. App. 170a. There was no evidentiary hearing on the exclusion, and no written findings were entered. The basis of the lower court's oral ruling was that the sole black male plaintiff had withdrawn, and that black women's complaint that they were excluded from the traditionally-male entry-level Material Handler job category created a conflict of interest with black men who were benefitted by the reservation

of that job for men. At the December 1974 hearing, the trial court denied plaintiffs' motion that notice be sent to black males, informing them of their provisional exclusion unless one of them stepped forward as a new class representative.[1/]

At trial, both sides presented extensive evidence on the question of racial discrimination against black males, as well as on the question of racial discrimination against black females.[2/] Both lower courts found that the company had engaged in subjective disparate-treatment discrimination against black males and females in hiring and promotions, and had engaged in disparate-impact discrimination against black males and females in its educational

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1. See App. 148a n. 16, 673 F.2d at 838 n. 16.

2. The same types of statistical evidence, and the same testimony, were used to prove racial discrimination against both black males and black females.

requirements and failure to post notices of job vacancies.[3] The degree of identity between the racial discrimination claims of black males and of black females was so great that the court of appeals even held that black females could prove racial discrimination against themselves by proving racial discrimination against all blacks.[4]

After the trial, plaintiffs renewed their efforts to include black males in the class, but the district court made the exclusion final on December 8, 1976. App. 207a, 222a, 74 F.R.D. 14. On January 24, 1979, the district court again re-affirmed the exclusion of black males from the class. App. 233a.

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3. App. 62a-86a, 94a-101a, 673 F.2d at 818-24, 826-27; App. 188a-195a, 416 F. Supp. at 257-61. See Judge Goldberg's dissent, App. 142a-145a, 673 F.2d at 837-38.

4. Thus, it was necessary to decide the question of racial discrimination against black men in order to adjudicate the question of racial discrimination against black women.

The Magistrate issued his Report and Recommendation on further injunctive relief on July 24, 1980. App. 235a. In it, he recommended awarding constructive seniority and priority hiring relief to black females harmed by hiring discrimination, but stated that the exclusion of black males from the class should bar black male victims of hiring discrimination from such relief. App. 238a, 248a, 257a-258a. Plaintiffs appealed to the district court the recommended denial of such relief to black male discriminatees but on August 18, 1980, the trial court adopted the Magistrate's Report and Recommendation without change. App. 264a. All parties appealed.

A divided panel upheld the trial court's exclusion of black males from the class both before and after the trial, and upheld the denial of all individualized relief to black males notwithstanding the

findings of discrimination against them. App. 26a-39a, 673 F.2d at 809-13. Judge Goldberg dissented. App. 115a-165a, 673 F.2d at 830-42.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is in Conflict With This Court's Decision Last Term in General Telephone Company of the Southwest v. Falcon.

On June 14, 1982, this Court decided General Telephone Co. of the Southwest v. Falcon, ___ U.S. ___, 72 L.Ed.2d 740 (1982). This decision was the latest step in an effort by this Court to instruct the courts of appeals to pay less attention to abstract rules of thumb, and more attention to the specific provisions and purposes of Rule 23 and the facts and circumstances of the cases before them, when deciding Rule 23 questions. See also East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977).

Reliance on abstract rules of thumb in unnecessarily narrowing a proper class is as great a disservice to the purposes of Rule 23 as reliance on such abstract concepts to certify an impermissibly broad class. The defect in both situations is the same: ignoring the purposes of Rule 23, and ignoring the specific facts and circumstances of the case at bar.[5/]

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5. The degree of abstraction in the divided panel's approach is best illustrated by its result. Black males were excluded from the class herein in order to "protect" them from the black female plaintiffs' assertion of a sex discrimination claim as to the Material Handler job. Their exclusion did not prevent the litigation of that sex claim; the challenge went forward, and plaintiffs prevailed. The exclusion therefore did black males no practical good. It did, however, do them quite tangible harm: it deprived them of their rights to the priority hiring accorded black female discriminatees, it deprived them of their rights to the awards of constructive seniority accorded to black female discriminatees to compensate for discriminatory delays in hire, and it deprived them of the rights to back pay accorded to black female discriminatees. In the name of "protecting" black men, black men have lost all relief in this case.

In Falcon, this Court made clear that a claim of conflict should not bar a group from a class if, on balance, the group in question had strong interests in common with the class representatives. Thus, although there may be a conflict "between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority," and although generally "the same plaintiff could not represent these classes" under Rule 23,[6] this Court nonetheless recognized that the interests of both groups could be so interrelated in fact that Rule 23 would allow their joint representation by the same plaintiff:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent

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6. 72 L.Ed.2d at 750 n.13, quoting General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 331 (1980).

> employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

72 L.Ed.2d at 751 n. 15. Here, the theoretic conflict was between black males and black females, and it is undisputed that the same educational requirements were applied to blacks of both sexes, that the same subjective hiring and promotional practices were applied to blacks of both sexes, and that the failure to post notices of vacancies in better-paying jobs applied equally to blacks of both sexes. Instead of basing its decision on these factors, which boil down to a balancing of the risk of harm to black males caused by their

inclusion in the class with the harm black males would suffer by exclusion,[7] the panel majority felt that such a course would be improper:

> This argument diverts attention from the proper inquiry under Rule 23.

App. 33a, 673 F.2d at 812.

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7. While it is theoretically possible for black males to protect their interests by intervention on remand or by the filing of a new lawsuit, such a course of action would face a number of potential obstacles:

> —Would the original plaintiffs' EEOC charges suffice as the basis for Title VII jurisdiction, or would black males have to file new charges?
>
> —If black males have to file new Title VII charges, would the original plaintiffs' charges in this case toll the charge-filing period for black males in the new case, so that black males can obtain relief in the new case for the same acts of discrimination for which they could have obtained relief in this case?
>
> —Would the original plaintiffs' filing of suit under 42 U.S.C. § 1981 in this case toll the period of limitations for black males in a new case, so that the new lawsuit would cover acts of discrimination going

(footnote continued)

In Falcon, this Court also made clear that, in deciding whether to certify a class, strong weight should be given to the question whether the adjudication of the admittedly proper claims "would require the decision of any common question" concerning the challenged portion of the class, and would involve the same evidentiary approaches. 72 L.Ed.2d at 751. If so, class treatment would advance "'the efficiency and economy of litigation which is a principal purpose of the procedure.'" Id., quoting American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553 (1974).

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back to March 1966, as the present suit does?

—If a new lawsuit is filed, would the claims of discrimination against black males have to be retried, thus duplicating the efforts expended in the present lawsuit and creating the risk of inconsistent adjudications?

Some of these questions are presented by a petition for certiorari in Western Electric Co. v. Hill, No. 82-393. To remit black males to this course may prejudice their rights.

Here, these requirements were clearly met but the divided panel ignored these considerations. Judge Goldberg correctly stated in his dissent:[8]

> In considering the class representatives' claims that defendant Travenol discriminated on the basis of both race and sex, the district court necessarily reviewed evidence bearing on the effect of Travenol's policies on blacks. However, the district court did not confine itself to an examination of evidence bearing upon discrimination against black women. Instead, the court specifically found that Travenol's hiring policies, educational requirements, failure to post job vacancies, and system of promotion adversely affected all blacks. In some cases, the findings were actually broken down to show the specific effect of discriminatory policies on black men.

Relegating black men to post-remand intervention or to the filing of a new and

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8. App. 142a-143a, 673 F.2d at 837 (footnotes omitted).

duplicative suit may possibly prejudice their interests,[9] but would certainly defeat the goals of Rule 23 expressed in American Pipe and reaffirmed in Falcon.

Finally, this Court in Falcon stressed the overriding importance of re-evaluating class decisions continually throughout the handling of the case, and changing the class certification and definition as appropriate in light of subsequent developments, including the handling of the class claims at trial. 72 L.Ed.2d. at 751-52. Here, the divided panel expressly rejected such a course:[10]

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9. See note 7, supra.

10. App. 31a-32a, 34a, 673 F.2d at 811-12. The contention that the results of trial have only a "one-way" importance - that they may be used only to narrow or decertify an improper or overly broad class but that they may not be used to support an expansion of an overly narrow class - has no support in the language of Rule 23 or the decisions of this Court.

> The plaintiffs argue that because both blacks and women were adequately represented at trial, the existence of a possible conflict between the two before trial is not relevant. We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative.... But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.
>
> * * *
>
> ...A court need not look beyond the issues in the suit before it to determine when a conflict of interest precludes adequate representation. We conclude, therefore, that the district court was within its discretion in excluding black males from the class.

Judge Goldberg, pointing out that the district court had reconsidered the class definition after the trial but had declined to change it,11/ stated that the lower

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11. Opinion of December 8, 1976, App. 207a, 74 F.R.D. 14; Order of December 8, 1976, App. 222a.

court's error was in failing to consider the results of trial when it reconsidered the question after the trial:

> The district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that there existed a potential conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiff's ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

App. 145a-146a, 673 F.2d at 837-38.

The decision of the divided panel does not conform to the factors stressed by this Court in Falcon. Instead, the majority relied on abstract propositions that ill serve the purposes of Rule 23. The

decision should be vacated, and the case remanded for reconsideration in light of Falcon.

2. The Decision Below is in Conflict With the Decisions of Other Courts of Appeals.

The decision below is in conflict with the decisions of the Fourth, Eighth, and Ninth Circuits with respect to the type and level of conflict of interests which must arise before Rule 23(a)(4) requires the barring from class membership and relief of a group otherwise properly includable in the class. To discuss the disagreement among the Circuits, it is first necessary to discuss the nature of the "conflict" on which the divided panel based its decision.

(a) The Panel's View of the Conflict Between the Black Female Plaintiffs and Black Males

The panel expressed succinctly its

view of a conflict of interests between the black female plaintiffs and black males:[12]

> The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish that males were favored at their expense. This claim plainly draws the interests of males into conflict with the interests of females . . . .

The panel also quoted and relied on the district court's statement:[13]

> . . . If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned, or for that matter any males who may have any interests in retaining their jobs as material handlers.

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12. App. 28a-29a (footnote omitted), 673 F.2d at 810-11 (footnote omitted).

13. App. 23a n. 8, 673 F.2d at 809 n. 8 (emphasis supplied).

Neither the district court nor the court of appeals relied on any testimony or other evidence of conflict,[14] but found a per se conflict arising from the mere existence of a challenge - any challenge - to the exclusion of women from any traditionally-male job category.[15]

But where does the conflict lie? The panel agreed that black males had no "legally cognizable" interest in perpetuating sex discrimination,[16] so no conflict seems to arise from a mere inquiry into the fact of discrimination and the entry of a

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14. Judge Goldberg pointed out that the finding of conflict was a conclusion of law, because it was based on a view of the issues rather than on the facts of the case. App. 124a-125a, 673 F.3d at 832-33.

15. Thus, the panel was able to say that "[a] court need not look beyond the issues in the suit before it" in deciding a question of conflict. App. 34a, 673 F.2d at 812.

16. App. 32a, 673 F.2d at 811.

declaration on the subject. Black males would surely not be troubled by the company's having to pay awards of back pay to the black women harmed by that practice. The only possible area of a conflict of interests would arise from an award of injunctive relief.

Even as to an award of injunctive relief, where is the conflict? Plaintiffs never sought the "bumping" of incumbent male Material Handlers; such relief is expressly unavailable under the Fifth Circuit's "rightful place" doctrine. James v. Stockham Valves & Fittings Co., 559 F.2d 310, 356 (5th Cir.), cert. den., 434 U.S. 1034 (1978), and cases there collected. The only possible injunctive relief would be relief intended to ensure that women be treated fairly in filling future Material Handler vacancies and in

filling vacancies above that level.[17] The only "conflict" of interest that can be envisioned is that unhired black males and black male Custodians would have to compete with black women for future Material Handler positions.[18]

Judge Goldberg described such a "conflict" as "in large part illusory." App. 126a, 673 F.2d at 833. He continued:

> The trial court apparently assumed that black women plaintiffs would seek to take material handler jobs away from black men who held those positions. This assumption is incorrect. A remedial order could only

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17. The Decree entered below provided such relief. Paragraph 3 prohibits any further subjective discrimination on the basis of sex, and paragraph 4 requires the validation of any new facially neutral selection criteria. App. 265a-266a.

18. Even so, the ending of sexual discrimination in operative job categories means that black male applicants can now compete for the Assembler jobs. While lower-paying, they are a distinct improvement on unemployment.

> affect future job placements; it could not remove incumbent material handlers from their jobs. ...Thus, there would be no conflict between the interests of black females who might seek future positions as material handlers and that of black males already holding the jobs.
>
> In fact, the only potential conflict I can find in this case is that of competition between black males and females seeking material handler jobs. However, the "conflict" among these class members is indistinguishable from the conflicts inherent in any Title VII class action. Whenever a Title VII plaintiff class prevails, the class members are thrown into competition with one another, as well as with non-class members, for a limited number of jobs. However, as the Majority acknowledges, this Court has consistently rejected the contention that job competition among class members creates a conflict sufficient to defeat class certification under F.R.Civ.P. Rule 23. See, ante, at 810, n. 10. To hold otherwise would effectively destroy the class action as a procedural device for enforcing Title VII rights, for it is impossible to imagine a Title VII class action that does not involve a potential conflict among class members at the relief stage of the litigation.

App. 126a-129a, 673 F.2d at 833-34 (citations and footnotes omitted) (emphasis in

original).

(b) The Decisions of Other Courts of Appeals

In Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir.), cert. den., 434 U.S. 856 (1977), the court reversed the denial of class certification and held that the black female plaintiff could represent a class of all blacks and of all women in claims of race and sex discrimination. The panel below seeks to dismiss the case as one in which only the issue of typicality was raised, and as one in which the plaintiff had alleged only "that the defendant employer favored white men at the expense of both blacks and females." App. 29a-30a n.12, 673 F.2d at 811 n.12.

To the contrary, Donaldson is in sharp conflict with the decision of the panel below. The Eighth Circuit expressly stated that discussions of typicality

include considerations of the absence of conflicts of interest, 554 F.2d at 879, and expressly stated that the plaintiff met the adequacy-of-representation requirement of Rule 23(a)(4). 554 F.2d at 831 n.5. As to the issues presented in Donaldson, the Eighth Circuit described claims almost identical to the claim that led the panel below to find an insuperable conflict:

* * *

> (c) separate hiring offices (until January 1973) for men and women with job limitations on women not applicable to men,

* * *

554 F.2d at 830.

Similar issues of conflict have arisen in Title VII cases in which a union has sued on behalf of a class of its female members or on behalf of a class of its black members. By challenging discrimination against part of its membership, each such union was necessarily increasing the job or salary competition its white members or its male members would face in the future. Indeed, several employees have sharpened their conflict-of-interest objections to such class representation by filing counterclaims against the union plaintiffs, seeking contribution for whatever back pay might ultimately be awarded.

The divided panel's per se rule in this case would clearly foreclose such class representation by a union. However,

other courts of appeals have generally held that such a level of conflict is not sufficient, in and of itself, to make the union an inadequate class representative. Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268-69 (4th Cir., 1981) ("Neither is Chesapeake Bay helped because the Union for purposes of this case is representing only blacks and women and not its white male members. There is no basis in the record for finding intraunion conflict at this juncture."); Social Services Union, Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir., 1979) ("[A]ny potential economic conflict between male and female employees is too amorphous and speculative to disqualify the union from representing the

[sex discrimination] class."); Int'l Woodworkers of America v. Georgia-Pacific Corp., 568 F.2d 64, 67-68 (8th Cir., 1977) (rejecting the claim of "a supposedly inherent conflict of interest between the white members of IWA and the alleged discriminatees.").

In each of these cases, the employer argued for a per se rule, based on a look at the issues. This was the approach taken below. The Fourth, Eighth, and Ninth Circuits all rejected such a claim, and held that the type of conflict necessary to bar class representation must be fully developed in an evidentiary record. In this case, the trial record itself demonstrates that there is no real conflict between black males and black females, but

the majority held that a trial record has only "one-way" relevance: it can be used to decertify an existing class, but may not be used to show the incorrectness of an assumption of conflict. As the Seventh Circuit aptly stated in McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 422 (7th Cir., 1977), in rejecting a claim of conflict:

> Per se rules often represent the abdication of judicial discretion rather than its informed exercise.

3. The Court of Appeals has Decided an Important Question of Federal Law which Should be Decided by this Court to Avoid the Undermining of its Decisions in Albermarle Paper Co. v. Moody and Franks v. Bowman Transp. Co.

In Franks v. Bowman Transp. Co., 424 U.S. 747, 770-71 (1976) and in Albermarle

Paper Co. v. Moody, 422 U.S. 405, 417-22 (1975), this Court held that, where discrimination has been found, a court must exercise its discretion "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." Both Franks and Albemarle Paper cautioned that a court may only use its discretion to deny relief "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination ... and making persons whole for injuries suffered through past discrimination." Albemarle Paper, 422 U.S. at 421; Franks, 424 U.S. at 774. Relief may be denied "only on the basis of unusual adverse impact arising from facts and circumstances that would not

be generally found in Title VII cases." 424 U.S. at 779 n.41. If they are to have meaning, these principles must apply with equal vigor to the denial of relief where it was accomplished by a restriction on class membership.

The type of "conflict" alleged here will exist in many class actions. The district court's rationale for the exclusion of black males from the class would, if applied generally, frustrate the goal of providing complete relief to the victims of discrimination. Indeed, it was not a black male---but an employer anxious to reduce its liability---which urged the importance of the conflict before both the lower court and this Court.

Unless the decision below is vacated or reversed by this Court, employers will

quickly seize on it as a means of eliminating or reducing liability to the victims of their discrimination, under the guise of concern for the rights of such victims. If a lawsuit challenges an educational requirement but the named plaintiff ultimately obtained a G.E.D. equivalency certificate, the employer will point to a conflict between those who ultimately satisfied the requirement and those who did not.[19]

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[19] The district court accepted such an argument here, and decertified from the class all black women who failed to meet the requirement. App. 170a-171a. That exclusion has not yet been reviewed, because the court of appeals had earlier declined to grant permission for the appeal under 28 U.S.C. §1292(b).

If a lawsuit challenges an employer's requirement that applicants be referred by a State Employment Service before they will be considered for employment, and if the named plaintiffs ultimately obtained such referrals after earlier discriminatory refusals to refer them, the employer will point to a conflict between those who were referred and those who were not referred.[20]

---

[20] The district court accepted such an argument here, and decertified from the class all black women who failed to meet the requirement of referral by the Mississippi State Employment Service, if they applied while that requirement was in effect. App. 170a-171a. This exclusion, too, will be reviewable at the end of the case.

Under the panel decision as it stands, the extent of an employer's classwide liability will be measured more by the ingenuity of its counsel than by the degree of its discrimination.

The employer's asserted concern for the welfare of some of the victims of its discrimination does them no practical good. As Judge Goldberg has pointed out, the task of adjusting relief among various groups at the remedial stage---such as the priority hiring relief for a given number of vacancies denied to blacks, constructive seniority determinations, and the like ---can protect the interests of black males only if they are before the Court as class members. Thus, their exclusion will prejudice, rather than protect, their interests. App. 131a-133a, 673 F.2d at 834-35.

4. The Panel's Refusal to Treat the Certified Class of all Blacks as an Independent Juridical Entity, Surviving the Withdrawal of the Black Male Plaintiff, Conflicts with the Decisions of this Court

The divided panel relied on the withdrawal of the sole black male plaintiff, more than two years after a class including black males had been certified, to find that the black males were not adequately represented and thus that they were properly decertified from the class. App. 34a-35a, 673 F.2d at 812-13. This holding is in sharp conflict with this Court's doctrine that a class becomes a separate

juridical entity after it has been properly certified, and that such a class survives the mootness, expiration, or lack of merit of the named plaintiff's claim. That the named plaintiff no longer has a personal stake in the case does not matter, for the class itself has a stake. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398-99 (1980); Zablocki v. Redhail, 434 U.S. 374, 382 n.9 (1978); Franks v. Bowman Transp. Co., 424 U.S. at 753-54; Sosna v. Iowa, 419 U.S. 393, 399-403 (1975). The important factor is that the plaintiff was a proper class representative at the time of class certification, and that there is now a live controversy between the class of black males and the defendants. Zablocki, 434 U.S. at 382 n.9; Franks, 424 U.S. at 755-56; Sosna, 419

U.S. at 402; Wilkinson v. Abrams, 627 F.2d 650, 656 n.8 (3rd Cir., 1980).

Under these decisions, no new class representative was necessary.[21]

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[21] The panel below sought to avoid these decisions by arguing that the absence of a black male plaintiff prevented subclassification, as a means of removing conflict within the same class. App. 34a-35a, 673 F.2d at 812. This Court has never held that subclassification is necessary to avoid abstract notions of conflict; even if it had so held, however, subclassification by issue is permissible under the clear language of Rule 23(c)(4), F.R. Civ. P., App. 280a. The trial court could have certified a subclass of all blacks affected by the same racial discrimination as the named plaintiffs, and a subclass of all women affected by the same sexual discrimination as the named plaintiffs. The benefit of subclassification is that it aids the Court in ensuring that distinct groups are treated fairly, and this benefit can be achieved whether or not the subclasses have different representatives.

5. The Decision of the Court of Appeals that no Notice Need be Provided the Members of a Certified Class, Before the Voluntary Withdrawal of a Class Representative Results in Their Decertification and the Dismissal of Their Claims, Involves an Important Question of Federal Law Which Should be Decided by This Court.

The panel held that the trial court was under no obligation to provide notice of their provisional decertification to black males, so that one or more of them could step forward and become a class representative. The panel did agree that the lower court had the power to give notice, and that the giving of such notice should be encouraged, but held that

Rule 23(e), F.R.Civ.P., did not require notice.[22]

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[22] The panel stated that plaintiffs had not relied on Rule 23(e). App. 35a-36a n.14, 673 F.2d at 812 n.14. This is incorrect. There is no dispute that plaintiffs asked the trial court to send a notice to black males before their exclusion from the class, see the dissent at App. 148a, 673 F.2d at 838, and the omission of a specific citation to the rule providing for such notice did not make their motion ineffective. See also Judge Goldberg's discussion of the obligation Rule 23(e) imposes upon the trial court to act sua sponte where necessary. App. 151a n.19, 673 F.2d at 839 n.19.

The panel held that the dismissal of the claims of a substantial part of a certified class, because of a voluntary withdrawal by a single plaintiff and despite the merits of those claims, is not a "dismissal" within the meaning of Rule 23. This attaches too much importance to what should be an irrelevant question: whether other claims in the case had been joined with those of black males. Surely the black males here have lost as much as if the case had been brought solely on their behalf, and then been dismissed after certification. Rule 23(e) clearly applies to the dismissal of all claims of a class, and no reason appears why its policy should not apply to the dismissal of all claims of a discrete group within a certified class.

This Court has held that mandatory notice requirements apply to voluntary dismissals of claims, "to prevent plaintiffs from selling out" the persons they represent. Burks v. Lasker, 441 U.S. 471, 485 n.16 (1979). The same result must follow when a particular plaintiff takes a voluntary withdrawal and the result is the dismissal of the claims of all black males. Judge Goldberg discussed the danger to the integrity of the judicial process posed by the panel's approach:

> Rule 23(e) is designed to serve at least two important purposes. First, it protects absent class members who may be relying upon the pendency of a class action from being prejudiced if their named representative should choose to drop his (and their) action. Second, the Rule is a prophylactic device, a safeguard designed to discourage collusion. Without Rule 23(e), class action defendants

> might seek to "buy off" class representatives in an effort to "turn off" a class action.
>
> Without in any way questioning the piety or sincerity of the named plaintiff who chose to withdraw from this case, we must recognize that his fortuitous departure from the lawsuit did result in the exclusion of all black males from the plaintiff class--a valuable boon to defendants. Thus, one can readily see the grave potential for abuse which will follow from the Majority's holding that Rule 23(e) notice is not required in a case such as this. Under the rule set forth by the Majority, future class action defendants may be tempted to quietly secure the withdrawal of the named class representative and thereby "turn off" the class action. If, as the Majority holds, Rule 23(e) can be ignored, there will be nothing to prevent such collusion.

App. 153a-154a, 673 F.2d at 839-40 (footnotes omitted). The issue is important, and worthy of this Court's consideration.

CONCLUSION

For the reasons stated above, petitioners pray that this Court grant their petition for a writ of certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of Falcon.

Respectfully submitted,

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October 1982

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No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIE MAE PAYNE, *et al.*, *Petitioners*,

v.

TRAVENOL LABORATORIES, INC. and
BAXTER LABORATORIES, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIE MAE PAYNE et al.,

Plaintiffs-Appellees
and Cross-Appellants,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,

Defendants-Appellants
and Cross-Appellees.

No. 80-3764

(April 22, 1982)
673 F.2d 798

Appeal from the United States District Court for the Northern District of Mississippi

Before CLARK, Chief Judge, and GOLDBERG and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

For the second time, we are asked to resolve some of the issues arising in this protracted employment discrimination class action between Willie Mae Payne and Travenol Laboratories, Inc. The district court issued a decree on August 18, 1980.

The decree, while leaving unfinished the back pay segment of this case, largely concludes the formulation of injunctive relief. Both parties have appealed urging numerous errors, major and minor.[1] Having journeyed deep into the record of this case to assess the merits of both parties' objections, we conclude that the bulk of the decree of the district court should be affirmed. We disagree with certain aspects of the decree, however, and therefore remand the case for further proceedings.

I. BACKGROUND

Nearly a decade old at the time of this appeal, this case began on March 2, 1972 when Willie Mae Payne, a black female, and several other named plaintiffs obtained right-to-sue letters and filed suit under Title VII, 42 U.S.C. § 2000e et seq. and

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1. In this opinion we shall refer to Payne as the plaintiff or the appellant, and to Travenol as the defendant or the appellee.

also filed claims under 42 U.S.C. § 1981 against Travenol Laboratories. Payne attacked a battery of Travenol's employment practices at its Cleveland, Mississippi, pharmaceutical plant as being racially discriminatory. The complaint was later amended to include charges of sex discrimination as well.

Travenol, the largest employer in Cleveland, Mississippi, manufactures and packages drugs, particularly intravenous solutions, for distribution to medical facilities. The solutions are packaged on an assembly line by employees called "operatives". Two types of employees work on the assembly line: assemblers, who fill, cap, and inspect the bottles, and material handlers, who orchestrate and guide the flow of materials through the assembly process. Material handlers are compensated considerably better than assemblers, whose

hourly pay is only slightly above the janitorial or custodial staff. The assembler and material handler positions require no special skills or experience.

Travenol employed no blacks at its plant until prodded by the affirmative action office of the Navy in 1964 or 1965. At that point, Travenol began to hire blacks. Simultaneously, Travenol required all applicants to be screened and referred by the Mississippi State Employment Service (MSES) and imposed a requirement that all applicants have a tenth-grade education or General Equivalency Diploma. Travenol then interviewed referred candidates and hired upon subjective appraisals of their alertness, comprehension, and cleanliness. Until 1968, Travenol had MSES refer only males for the material handler position and females for the assembler position. Travenol discontinued its reliance on MSES

in 1971, but retained the tenth-grade requirement. Travenol also employs clerks, technicians, and managers. These positions have been filled both by promotions and by outside hiring. Travenol requires a twelfth-grade education or General Equivalency Diploma for some of these positions and a college degree for others. Travenol's staff above the operative level was almost exclusively white until 1974.

In 1975 the case was tried on the issue of liability, Payne representing a class of black females. The district court rendered its decision in 1976, finding that Travenol had discriminated on the basis of race and sex.[2] The court enjoined certain employment practices and directed the

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2. The district court's opinion on Travenol's liability is reported in Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 (N.D. Miss. 1976), affirmed in part and reversed and vacated in part, 565 F.2d 895 (5th Cir. 1978), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed. 2d 131 (1978).

parties to submit suggestions on further relief, including constructive seniority and backpay.

On appeal, we vacated two aspects of the injunction and affirmed two others.[3] First, we held that the district court's blanket injunction against Travenol not to discriminate on the basis of race or gender in its employment practices was not specific enough to satisfy Federal Rule of Civil Procedure 65(d). Second, we held that no named plaintiff had standing to challenge Travenol's requirement of a tenth grade education for its entry-level assembly-line positions and vacated the district court's conclusion that the tenth-grade requirement violated Title VII. Third, we affirmed the district court's injunction against Travenol's use of a

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3. 565 F.2d 895 (5th Cir. 1978), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978).

twelfth-grade requirement for certain positions above entry-level. Fourth, we affirmed the injunction against Travenol's college degree requirement for other, higher-level positions.[4]

After our decision in Payne I, the district court directed that a magistrate hear the parties' suggestions for further relief and devise a recommended order. After ruling on numerous discovery skirmishes, the magistrate prepared a report and a proposed decree which the district court adopted in full. The decree is interlocutory in that it does not provide for a back-pay award.

The decree is tailored to provide injunctive relief for the discrimination that

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4. Both parties agreed that a paragraph of the injunction concerning disability coverage for pregnancy had to be vacated in the light of General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). See Payne I, 565 F.2d at 897.

the district court had found in its 1976 decision, taking into account our decision in 1978 and hearings held before the magistrate in 1980. Paragraph one provides that the district court will retain jurisdiction for two years to supervise the decree, provided that back-pay litigation is concluded by that date. Paragraph two reaffirms the district court's earlier grant of injunctive relief against Travenol's use of twelfth-grade and college-degree requirements for certain positions above entry level. Paragraph three prohibits Travenol from discriminating subjectively on the basis of race or sex in violation of Title VII or § 1981 in its hiring and promotions decisions.

Paragraphs four, five, six, seven, and nine spell out more specific actions that Travenol must take to remedy its discriminatory hiring and promotion practices. Paragraph four, for example, prohibits

Travenol from establishing new facially-neutral job prerequisites except in accord with guidelines promulgated by the Equal Employment Opportunity Commission. Paragraph seven requires Travenol to post notice of job vacancies, with details about salary, shift, and other matters.

Paragraph eight provides that Travenol must write to all unhired applicant class members who had applied by February 19, 1976, and invite them to reapply for work at Travenol. Those class members who respond are to be given priority over other applicants until they have refused an offer, accepted an offer, or been rejected on legitimate grounds. Travenol is also required to sort out those applicants who were qualified for clerical work and who indicated an interest in it, and invite them to apply for clerical jobs, giving them priority over other applicants.

Paragraph ten provides for granting constructive seniority to applicant class members who were rejected for discriminatory reasons, and employee class members whose date of hire was delayed by discrimination. Paragraph eleven provides for the use of an employee class member's constructive seniority date in recalling employees from layoff. The remaining paragraphs provide the details for administering the decree.

Both parties object to portions of the decree. First, Payne argues that the decree denies her relief because the district court erroneously excluded black males from the class she represents and also because it erroneously established March 3, 1970 as the opening date of the class. She requests that we include black males in the class and move the opening date of the class back to the period of limitations for

Title VII and for § 1981. Second, Travenol argues that the plaintiffs failed to prove discrimination in hiring or promotions, and asks us to reverse any relief in the decree on these issues. Payne argues that she proved discrimination in areas in which the district court erroneously denied her relief, and asks us to broaden the decree accordingly. Third, both parties lodge various objections to the form of the decree. Travenol claims that the decree affords too much relief, if discrimination was properly found. Payne argues that the decree affords too little relief. Our appellate jurisdiction to review this interlocutory decree rests on 28 U.S.C. § 1292(a)(1). We address each issue in turn.

II. LIMITATIONS ON THE CLASS CERTIFIED BY THE DISTRICT COURT

The district court certified a class in 1972 to include all black female

employees and applicants at Travenol's plant, but limited the class to exclude all applicants who applied before March 3, 1970, and did not reapply thereafter. As initially certified, the class also included black male employees and applicants, but in 1974 the court granted the defendant's motion to exclude black males from the class. The court made its class certification final in December, 1976, and authorized an interlocutory appeal of this order under 28 U.S.C.A. § 1292(b), but we declined to accept the appeal. The grant of injunctive relief that we review today, therefore, awards relief only to those members of the class finally certified by order of the district court in December, 1976.[5]

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5. The district court certified the following class:

> All present, past, and future black female employees and all present, past and future black female applicants for

(footnote continued)

Payne argues that the district court denied injunctive relief to two groups of persons who were shown at trial to be victims of discrimination. These two groups are black males, and applicants who applied before March 3, 1970 but not after that date. Both groups were denied relief because they fell outside of the confines of the class certified by the district court. Payne urges us to reverse these limitations on the class in order to afford full relief for all those entitled to it.

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employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

[1] Before we may address these arguments, however, we must decide whether our jurisdiction to hear this interlocutory appeal from the grant or denial of an injunction encompasses the power to review the definition of a class, when injunctive relief was denied to persons excluded from the class. Travenol challenges our jurisdiction, claiming that under Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), class certification questions may not be heard on interlocutory appeal. Because we find that the appellees read Gardner too broadly, we reject their arguments and conclude that the definition of the class may be reviewed to the extent that it led to the denial of injunctive relief.

A. Jurisdiction to Review the Definition of the Class

In Gardner v. Westinghouse Broadcasting Co., supra, the plaintiff brought a

Title VII suit on behalf of herself and all female applicants and employees who might be subject to sex discrimination by the defendant employer. After the district court denied a pretrial motion for class certification, the plaintiff immediately appealed under 28 U.S.C. § 1292(a)(1), arguing that the refusal to certify the class effectively denied her much of the injunctive relief she sought. Refusing to allow the appeal, the Supreme Court held that a pretrial denial of class certification was not appealable as a refusal of injunctive relief under section 1292(a)(1). The Court noted that section 1292(a)(1) creates an exception to the policy against interlocutory and fragmentary appeals. The purpose of this exception is to give litigants a chance to gain effective review of orders with irreparable consequences. Concluding that the denial of class certification at the outset of the lawsuit does not carry a

threat of irreparable harm, the Court declined to place class certification questions in the category of refusals of injunctive relief that may be appealed before judgment on the merits.

We address a different question than the one faced by the Supreme Court in Gardner. Here, the district court conducted a trial on the merits, granted an injunction, and withheld portions of injunctive relief because of the definition of the class. The appellant does not seek to appeal the ruling on the composition of the class as an independent matter. Rather, she challenges the district court's denial of injunctive relief, which, in turn, requires her to attack the order that lead[sic] to the denial. That order was the district court's certification of the class. Our established power to review the denial of injunctive relief embraces the power to

review the orders that underpin this denial.

The Gardner Court recognized that it was not presented with the question we answer today, and it limited its holding to the facts before it. In a footnote, the Court distinguished Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164 (7th Cir., 1976)(en banc), cert. denied, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976), in which the Seventh Circuit reviewed the district court's denial of class certification when that denial led to the refusal of a preliminary injunction. 437 U.S. at 479 n.3. This appeal fits the Jenkins mold rather than Gardner. We agree with the Jenkins court.[6] To hold that section

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6. The case for reviewing the class question here is even stronger than in Jenkins. In Jenkins, the district court denied a pretrial motion to certify a class, and then refused a preliminary injunction. The Court of Appeals entertained an appeal of this ruling before a trial on the merits as is authorized by section 1291(a)(1). Here, by contrast, though we are not reviewing a final judgment, we are presented with a case in a considerably advanced stage of litigation. A two week trial on

(footnote continued)

1292(a)(1) does not permit interlocutory appeals of denials of class certification, even if injunctive relief might thereby be compromised, is one thing; to hold that section 1292(a)(1) does not permit review of the district court's definition of a class when a denial of injunctive relief turns on that ruling is quite another. We find nothing in Gardner that compels us to refrain from reviewing the contours of class composition when they shape the contours of injunctive relief.

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the merits has occurred, as well as further hearings aimed at developing appropriate relief; the class question has been treated as final by the district court for at least five years; and the decree entered by the court is a comprehensive resolution of all issues in the case except back pay. Gardner sought to promote the policies against fragmentary and uncoordinated interlocutory appeals. These policies have much less force when applied to a case like this one. Judicial economy is furthered by our present consideration of the class definition issues. To postpone consideration of these issues until after the adjudication of back pay only threatens to delay final resolution of this case.

We recently observed that otherwise unappealable orders may be reviewed when necessary to review a denial of injunctive relief. Gould v. Control Laser Corp., 650 F.2d 617, 621, n.7 (5th Cir. 1981). The Supreme Court has gone even further in authorizing review of otherwise unappealable orders in a case properly before a Court of Appeals to review a preliminary injunction ruling. In Deckert v. Independence Shares Corporation, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1940), the district court had denied the defendants' motions to dismiss, then granted a preliminary injunction. The defendants appealed from the injunction and the Court of Appeals reversed not only the injunction but also the district court's denial of the motions to dismiss. The Supreme Court held that the Court of Appeals "properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order

only on appeal from a final decision." 311 U.S. at 287, 61 S.Ct. at 232. We have followed Deckert in Myers v. Gilman Paper Corp., 544 F.2d 837, 847 (5th Cir., 1977), cert. dismissed, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977), modified on other grounds, 556 F.2d 758 (5th Cir., 1977), and in Mercury Motors Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973). We need not rely here on the theory of Deckert, however. The questions concerning class certification that Payne raises are directly tied to the partial denial of an injunction that is properly before us. We therefore have power to resolve the questions of class definition as an incident of our review of the injunction. Accord: Adashunas v. Negley, 626 F.2d 600, 602-03 (7th Cir. 1980).

B. Black males

We now turn to Payne's challenge to the exclusion of black males from the class. To place this challenge in

perspective we review the history of the district court's treatment of the class as it bears on this issue. This case was filed as a class action on March 2, 1972, by three named plaintiffs: two black females, Willie Mae Payne and Alma Jean Williams, and one black male, James Williams. The complaint alleged that Travenol discriminated against all three and the class they represented on the basis of race. On November 16, 1972, the court conditionally certified the plaintiff class to include all black applicants and employees.

On May 1, 1973 the court permitted Willie Mae Payne to amend her complaint. The amended complaint alleged sex discrimination as well as race discrimination. On May 8, 1973, the court granted James Williams' motion to withdraw from the case because of his religious views. More than one year later, on July 31, 1973, two black

females, Delilah Cherry and Birdie Lee Griffin, were permitted to intervene in the case alleging race and sex discrimination. These developments prompted the defendants to move the district court to redefine the class, and on December 20, 1974, the district court did so. The new class excluded black males, and other changes were made in the composition of the class.[7]

The district court made no written findings on its reasons for excluding black males, but the transcript of a hearing on the issue reveals that the district court was swayed by two factors. First, the district court noted that no male plaintiff remained in the case after James Williams' withdrawal. The only remaining plaintiffs were black females. Second, the court

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7. The plaintiffs had sought in the trial court to represent white females. The district court denied the motion on December 20, 1974, and the plaintiffs do not challenge that ruling on this appeal.

believed that a conflict existed between the interests of black males and the black female plaintiffs who sought to represent them. The black females charged sex discrimination in the assignment of material handlers. According to the court, this created a conflict because to the extent that females proved sex discrimination, the interests of males would be impaired.[8] The court thus concluded that black females could not adequately represent the

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8. The district court stated: "I think there is too much conflict between the males and the females in this situation for them to represent a class which would involve black males, or males of either race. There is a controversy in this case with reference to whether or not females should be permitted to be employed in the position of material handler in the plant, because they have always been assigned to and employed in the assembly part of the plant, and in that category which carries, as I understand it, a lower rate of pay. If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned, or for that matter any males who may have any interests in retaining their jobs as material handlers."

interests of black males.

After this ruling, counsel for the plaintiffs requested that black males be sent notice of their provisional exclusion from the class and of the need for one of them to step forward if black males were to remain in the case, but the district court declined. The court directed, however, that members of the new provisional class receive notice of their inclusion in the case and be given an opportunity to opt out. On December 8, 1976, after trial, the court made its class definition order final.

The appellants contest the redefinition of the class to exclude black males on two grounds. First, Payne denies the existence of a conflict between black females and black males that warrants excluding males from the class. Second, Payne argues that black males had a stake in the litigation because of their provisional inclusion in the class, see Sosna v. Iowa, 419 U.S.

393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and the district court had an obligation to protect their interest. The district court, therefore, should have sent notice to black males to permit one to intervene as a plaintiff. Had this been done, the class could have been subdivided to remove the conflict between the interests of black females and black males.

[2] The first inquiry must be whether the district court erred in denying that black females may represent a class including black males in a mixed sex and race discrimination suit. The district court's decision on the scope of the class can be overturned only for abuse of discretion. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038-39 (5th Cir. 1981); Walker v. Jim Dandy Co., 638 F.2d 1330, 1334 (5th Cir. 1981).

[3] We start with the language of Rule

23. Under Rule 23(a) one of the four prerequisites to a class action is that "the representative parties will fairly and adequately protect the interests of the class."[9] Fed.R.Civ.P. 23(a). The claim that black females hold interests in conflict with the interests of black males, if true, is sufficient to defeat the adequacy of their representation. "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7 C. Wright & A. Miller, Federal Practice & Procedure § 1768 at 638 (1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

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9. All four prerequisites of Rule 23(a) must be met before certification of a class is appropriate. Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc). Of course, the court must go on to decide if the further requirements of Rule 23(b) are satisfied before certifying the class.

[4-6] Of course, in an employment discrimination case the court must interpret Rule 23 to accommodate the substantive policies of Title VII. See Vuyanich v. Republic National Bank of Dallas, 82 F.R.D. 420 (N.D.Tex. 1979). We have repeatedly upheld the maintenance of across-the-board Title VII class actions in which, for example, an employee complaining of race discrimination represents not only other employees but also applicants suffering similar discrimination.[10] An across-the-board Title VII

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10. See Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981); Falcon v. General Telephone Company of the Southwest, 626 F.2d 369 (5th Cir. 1980), vacated and remanded on other grounds, 450 U.S. 1036, 101 S.Ct. 1752, 68 L.Ed.2d 234 (1981), reinstated in part and remanded in part, 647 F.2d 633 (1981), cert. granted, ____ U.S. ____, 102 S.Ct. 668, 70 L.Ed.2d 637 (1981); Long v. Sapp, 502 F.2d 34 (5th Cir., 1974), Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970), cert. denied, 400 U.S. 951, 91 S.Ct. 241, 27 L.Ed.2d 257 (1970), Johnson v. Georgia Highway Express, supra. We upheld the right of the plaintiffs in this case to prosecute an across-the-board Title VII action in Payne I, 567 F.2d at 900.

attack requires only that there be a sufficient "nexus" between the claims of the named plaintiff and the claims of the class. Payne I, 565 F.2d at 900. Yet, while Title VII policies support a broad reading of Rule 23, they do not justify the jettison of the cardinal principle that a class representative may not head a class including persons whose interests substantially conflict with his or her own. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453 (1977).

[7] The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish

that males were favored at their expense. This claim plainly draws the interests of males into conflict with the interests of females.[11] We are aware of no case holding that a black female plaintiff is an adequate representative of black males in a sex and race discrimination suit when the interests of the two groups conflict.[12] On the

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11. "On the one hand, [the black female plaintiff] would argue that defendant's policies and practices discriminated in favor of males, including black males, and against females. At the same time, she would claim that defendant favored whites, including white females, over blacks. In light of these conflicting positions, plaintiff would not be an adequate representative of either black males or white females." Colston V. Maryland Cup Corp., 26 F.R. Serv.2d 940, 943 (D.Md. 1978).

12. The only Circuit to have ruled on the propriety of a black female representing blacks and females in a mixed sex and race discrimination suit is the Eighth. In Donaldson V. Pillsbury, 554 F.2d 825 (8th Cir. 1977), cert. denied, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977), the Court held that a black female alleging both race and sex discrimination had claims that were typical of all female and all black employees and, therefore, she could represent them. "Typicality" under Rule 23(a)(3) was the sole issue in the case; the Court did not discuss possible conflicts of interest between the plaintiff and the class that might render her representation inadequate under Rule 23(a)(4).

(footnote continued)

contrary, a host of district courts have refused to permit black females to represent black males in class actions alleging both race and sex discrimination when a conflict of interest appears.[13]

[8] A court should not lightly reject a black female's claim to represent all blacks and all females in a sex and race discrimination suit. Rather than determine the question of conflict abstractly, the court must examine the interlacing allegations of race and sex discrimination to

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Moreover, the plaintiff in Donaldson alleged that the defendant employed favored white men at the expense of both blacks and females. 554 F.2d at 830. Thus, the conflict we find here was not present in Donaldson.

13. See Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496 (E.D.Ark. 1980); Hammons v. Folger Coffee, Inc., 87 F.R.D. 600 (W.D.Mo. 1980); Edmondson v. Simon, 86 F.R.D. 375 (N.D.Ill. 1980); Vuyanich v. Republic National Bank of Dallas, 82 F.R.D. 420 (N.D.Tex. 1979); Colson v. Maryland Cup Corp., 26 F.R.Serv.2d 940 (D.Md. 1978); Droughn v. FMC Corp., 74 F.R.D. 639 (E.D.Pa. 1977); Martinez v. Bechtel Corp., 21 F.R.Serv.2d 85 (N.D.Cal. 1975); Arey v. Providence Hospital, 55 F.R.D. 62 (D.D.C. 1972).

determine whether an actual conflict exists. For example, if a black female plaintiff argues that the employer favors white males to the detriment of both females and blacks, there is no inherent obstacle to her representation of both groups. See Donaldson v. Pillsbury, 554 F.2d 825 (8th Cir. 1977), cert. denied, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128 (1977); Vuyanich v. Republic National Bank of Dallas, supra, 82 F.R.D. at 435. In this case, however, the district court found an actual conflict of interest and we see no error in this conclusion.

[9, 10] The plaintiffs argue that because both blacks and women were adequately represented at trial, the existence of a possible conflict between the two before trial is not relevant. We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court

may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative. Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), vacated and remanded on other grounds, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981). But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.

The plaintiffs also argue that black males have no "legally cognizable" interest in perpetuating sex discrimination at Travenol's plant, and we agree. But black males do have an interest in representation of their interests with undivided loyalty. The existence vel non of sex discrimination is at issue in this case. Black males are entitled to a class representative who is

free from a desire to prove a claim that will impair their interests.

[11, 12] Finally, the plaintiffs contend that we must balance the harms to black males flowing from their inclusion in the class against the harms flowing from their exclusion. Payne maintains that the harms of excluding black males overshadow the potential harms of including them. The district court's ruling deprives black males of the benefits accorded to class members, including constructive seniority and back pay. To include them in the class despite the conflict of interest, Payne argues, would have brought them much less harm. This argument diverts attention from the proper inquiry under Rule 23. Rule 23 forces a court to measure the adequacy of representation because of the sensitive considerations involved in binding parties not before the court to a judgment won or lost by class representatives. See Hansberry v.

Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). A court need not look beyond the issues in the suit before it to determine when a conflict of interest precludes adequate representation. We conclude, therefore, that the district court was within its discretion in excluding black males from the class.

[13, 14] Ordinarily, if a court discerns a conflict like the one in this case, the proper solution is to create subclasses of persons whose interests are in accord. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). Of course, each subclass must be headed by a person who claims the same injury as the subclass, but who lacks the fatal conflict. See East Texas Motor Freight System, Inc. v. Rodriguez, supra; Johnson v. American Credit Co., 581 F.2d 526, 532-33 (5th Cir., 1978). In this case, after the sole black male plaintiff, James Williams, withdrew from

the case, no named plaintiff existed to head a class of black males. Payne therefore argues that having provisionally included black males in the class, the district court owed black males a duty to send them notice of their pending exclusion from the case to allow one of them to step forward to intervene. We do not find this obligation in the law.

[15] Rule 23 requires a district court to give notice to absent class members of developments in the suit in only two situations. The first is when the court certifies a class under Rule 23(b)(3) because of common questions of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve the claims. Fed.R.Civ.P. 23(c)(2); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The second is when a class action is to be dismissed or compromised. Fed.R.

Civ.P. 23(e).[14] In all other cases, notice lies within the district court's discretion. Fed.R.Civ.P. 23(d)(2). The district court thus had discretionary power to give black males notice of their impending exit from the case. Such action in general is to be encouraged.[15] We cannot say, however, that

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14. The plaintiffs have not argued that the redefinition of the class in this case is a dismissal within the meaning of Rule 23(e), and we do not consider it to be one.

15. In Silva v. Vowell, 621 F.2d 640, 649 (5th Cir. 1980) (quoting Johnson v. American Credit Co., supra, 581 F.2d at 533 n.13), cert. denied, 449 U.S. 1125, 101 S.Ct. 941, 67 L.Ed.2d 111 (1981), we stated that if the court had found no named plaintiff qualified to represent a subclass, "the court could have considered 'whether it is in the interest of justice and judicial economy to postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action.'" In Sullivan v. Winn-Dixie Greenville Inc., 62 F.R.D. 370, 377 (D.S.C. 1974), the court followed this procedure but did not require notice to the subclass members. But see Alexander v. Avco Corp., 380 F.Supp. 1282, 1286 (N.D.Tenn. 1974), (the court gave notice to class members to give them an opportunity to intervene as individuals before dismissing the class action) modified, 565 F.2d 1364 (6th Cir., 1977), cert. denied, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978).

the court transgressed its authority in failing to recruit a new black male plaintiff to intervene to permit subdivision of the class. Cf. United States Parole Commission v. Geraghty, 445 U.S. 388, 100 S.Ct. 1202, 1214, 63 L.Ed.2d 479 (1980) (after denying class certification, a district court must give the representative of the plaintiff class an opportunity to propose subclasses, but has no obligation to construct them itself).

[16, 17] Were we to accept Payne's reasoning, a district court that provisionally certified a class but later concluded that the existing class representative was inadequate would have to send notice soliciting a new class representative. Plainly, that is not the rule in this Circuit, see Johnson v. Uncle Ben's, Inc., supra, 628 F.2d at 423, nor should it be. The rule that Payne proposes would shift a burden onto the district court that properly

remains with the plaintiff.[16] Only if the black males had received notice of their initial inclusion in the class, had relied on the class suit to protect their rights, and would be prejudiced as a practical matter by exclusion from the class might the district court be obligated to take some action to safeguard their interests. See Seligson v. Plum Tree, Inc., 61 F.R.D. 343, 346 (E.D.Pa. 1973); Berse v. Berman, 60 F.R.D. 414, 416 (S.D.N.Y. 1973). Here,

16. At oral argument, plaintiffs' counsel advised this Court that counsel failed to seek a black male plaintiff to intervene on his own because of doubts that attorneys for the plaintiffs could freely communicate with class members. Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) made clear that a district court may not curtail communications between the attorney for the plaintiff and class members, at least in the absence of specific findings that such an order is appropriate or necessary to prevent abuses. 101 S.Ct. at 2193. Although in 1974 the plaintiffs lacked the guidance of Gulf Oil, nothing in the record indicates that the plaintiffs asked the district court to allow them to communicate with the class. We cannot impose a duty on the district court to fill the void created by the plaintiffs' failure to press their rights to communicate with persons excluded from the class.

there is no showing that black males relied to their detriment on the district court's provisional inclusion of them in the class. In the absence of such a showing, we decline to hold that the district court abused its discretion in failing to give them notice. In sum, the district court on this record was justified in its discretion in believing that recruiting black males after the one black male had dropped out almost two years before would constitute the stimulation of a new law suit by the court rather than a continuation of the old.

C. Opening date for class membership

We now take up Payne's argument that injunctive relief was improperly limited because the district court fixed an incorrect opening date for membership in the class. The district court limited the class to black females who applied at Travenol after March 3, 1970. Neither party is certain why the district court chose this date, and

the court itself gave no reason. Payne urges us to move the date back to include all applications within the limitations periods for both Title VII and Section 1981. Travenol resists any extension and maintains that despite some difficulties in the date chosen by the district court, there is no abuse of the court's discretion. We are persuaded that the court did abuse its discretion in choosing the opening date, although our analysis differs from either of the parties'.

[18-20] The opening date for membership in a class for a Title VII claim should be set by reference to the earliest charge filed by a named plaintiff. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (D.C.Cir. 1976) cert. denied, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 246 (3d Cir. 1975), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415,

44 L.Ed.2d 679 (1975). See also Crawford v. Western Electric Co., 614 F.2d 1300, 1309 (5th Cir. 1980). But see Chisholm v. United States Postal Service, 665 F.2d 482, 489 (4th Cir. 1981)(opening date for class membership set by reference to the date from which a named plaintiff could collect back pay). Here, that plaintiff is Willie Mae Payne, who filed her first charge on January 29, 1970.[17] For Title VII purposes, Payne

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17. There are at present three named plaintiffs in this case. Willie Mae Payne acquired a tenth grade GED on January 20, 1970. She applied at the Mississippi State Employment Service (MSES) for a referral to Travenol on January 29, 1970, but MSES did not refer her. Payne went to Travenol anyway, applied, and was refused a job. She filed two charges with the EEOC, the first on January 29, 1970 because of Travenol's rejection of her on that date, then on March 3, 1970, because of Travenol's rejection of her again on February 24. On March 17, 1970, Payne was referred by MSES and was refused employment a third time. No charge appears to have been filed in reference to the March 17 application. Nothing in the record indicates that MSES referred Payne before March 17.

Delilah Cherry obtained her GED in 1967, was referred by MSES shortly thereafter, and was denied employment over the next two years despite repeated

(footnote continued)

can represent a class that includes all qualifying[18] black female applicants who could have filed a timely charge with the EEOC when she did.[19] See Laffey v. Northwest Airlines, Inc., supra; Wetzel v.

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visits and phone calls to Travenol. She filed two EEOC charges, the first on August 14, 1970, the second on January 12, 1971.

Birdie Lee Griffin completed eleven years of school, was referred by MSES in 1966, and was refused employment despite renewed requests on abundant instances over the next four years. Her first EEOC charge is dated August 28, 1970. Like the other two plaintiffs, she filed a second charge, which the EEOC received on January 12, 1971.

18. The district court certified a class of black female applicants subject to two limitations, which are in addition to the date of application. First, the applicant must possess a tenth grade education. Second, she must have been referred by MSES during the time such referral was required.

19. Payne's first charge covers Travenol's alleged discriminatory acts that occurred after she filed it because they are sufficiently related to the allegations of the first charge. Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678, 689 n.6 (5th Cir. 1975); Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973). See generally Sanchez v. Standard Brands, Inc., supra. Thus, the January 29, 1970 charge encompasses Travenol's rejection of Payne on March 17, 1970, after she was referred by the MSES.

Liberty Mutual Insurance Co., supra. The charge filing period in 1970 was ninety days after the alleged act of discrimination.[20] See Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970). Thus, the opening date for the Title VII race discrimination class, counting back ninety days from the date of the January 20 charge, is October 31, 1969. All black females who satisfy the other requirements of class

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20. The statute was amended in 1972 to provide for a 180-day charge filing period. See Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 113, codified at 42 U.S.C.A. § 2000e.

We hold that the ninety-day charge-filing period, which was in effect before the 1972 amendments to Title VII, should govern this case. We reach this conclusion even though the right-to-sue letter on the charge that we use to set the opening date of the class was not issued until September 6, 1972, after the effective date of the 1972 amendments on March 24, 1972. Because Payne's amended complaint relates back to the date of the original complaint, Fed.R.Civ.P. 15(c), this case clearly was not pending with the EEOC on the effective date of the 1972 amendments. Therefore, the ninety day period is binding on Payne and the class she represents.

membership and who applied on or after October 31, 1969, should be members of the class for purposes of Title VII race discrimination. The district court's later date cannot be sustained.[21]

For the Title VII sex discrimination claim, the opening date of the class is October 31, 1969, the same date as for the Title VII race discrimination claim, because Payne's January 29, 1970, charge with the EEOC alleged both race and sex discrimination. Any black female employee or

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21. The court apparently chose this date because it was the date of Payne's second EEOC charge. When the original complaint in federal court was filed on May 2, 1972, Payne did not allege having filed charges with the EEOC on January 29, 1970; only the March 3 charge was mentioned in the complaint. The district court certified the class conditionally on November 16, 1972. Payne's amended complaint, filed May 3, 1973, did allege having filed a charge with the EEOC on January 29, 1970, but the district court failed to modify the opening date of the class to reflect the amended complaint. In any event, the court should have set the opening date of the class to include all persons who could have filed charges when Payne did instead of setting the opening date of the class on the date when she filed her charge.

applicant suffering sex discrimination on or after this date could have filed a timely charge of sex discrimination with the EEOC by the date Payne filed her charge. Thus, the sex discrimination claims take in a class of black female employees or applicants beginning on October 31, 1969.

[21] Our inquiry is not ended here, however, because the plaintiffs' alleged violations of 42 U.S.C.A. § 1981 as well as violations of Title VII. Although both of these statutes apply to employment discrimination cases, they have independent remedies and independent statutes of limitations. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Though both the district court's decision on liability and our earlier decision in this case failed to mention Section 1981, there can be no doubt that the Section 1981 claim was properly pleaded and adjudicated. The decree that

we review today enjoins subjective employment practices in violation of Section 1981, a ruling that must be premised on a finding of Section 1981 liability. We therefore examine what the appropriate Section 1981 class opening date should be. Cf. McWilliams v. Escambia County School Board, 658 F.2d 326 (5th Cir. 1981) (the Court separately examined whether a charge had been timely filed under Title VII and whether the acts complained of occurred within the statute of limitations for Section 1981 and Section 1983 before concluding that all claims were time-barred); Crawford v. Western Electric Co., supra, 614 F.2d at 1309. Petty v. Peoples Gas Light and Coke Co., 86 F.R.D. 336, 342-43 (N.D.Ill. 1979).

[22-24] Statutes of limitations for Section 1981 actions ordinarily are borrowed from state law. Johnson v. Railway

Express Agency, supra, 421 U.S. at 462, 95 S.Ct. at 1721. In Truvillion v. King's Daughters Hospital, 614 F.2d 520 (5th Cir. 1980), we held that a Section 1981 claim for a discriminatory refusal-to-hire is governed by the six-year Mississippi general statute of limitations.[22] 614 F.2d at 528. At least one of the named plaintiffs here, Birdie Lee Griffin, applied for a job with Travenol in 1966 after receiving an MSES referral, and was refused employment. Payne v. Travenol Laboratories, Inc., 416 F.Supp. at 252. Thus, if the proof supports it the plaintiffs may represent a Section 1981 race discrimination class that begins six years before the date when the complaint was filed in 1972, or March 2, 1966.

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22. Mississippi Code Annotated, Section 15-1-49 (1972) provides:

> All actions for which no other period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Section 1981, of course, does not embrace sex discrimination claims, Bobo v. ITT, Continental Baking Co., 662 F.2d 340 (5th Cir. 1981).

III. PROOF OF DISCRIMINATION

We come now to the merits of the plaintiffs' claim that Travenol's hiring, job assignment, promotion, and pay practices were discriminatory.[23] The district court found

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23. The plaintiffs alleged discrimination in four areas that are relevant to this appeal:

1. Discrimination in hiring into entry level positions. Travenol did not hire blacks at the same rate as whites, comparing applicant flow to hires.

2. Discrimination in initial assignment of those hired. Travenol assigned blacks disproportionately to custodial rather than operative work.

3. Discrimination in promotions. Travenol hindered the advancement of women from assembler to material handler, and offered both women and blacks scarcely any opportunity for promotion above the operative level.

4. Discrimination in merit pay. Travenol paid less to blacks and women in positions above the operative level for which the salary is determined subjectively through the merit system.

for the plaintiffs on most but not all liability issues. On appeal, the plaintiffs charge error in the district court's failure to find discrimination on the remaining issues. But for the educational requirements that we struck down in Payne I, 565 F.2d at 899-900, the defendant contends that the district court erred in finding any discrimination at all. We take up each issue in turn.

A. Discrimination in hiring.

[25] At the outset, we note one difficulty in assessing the proof of discrimination in hiring. When this case was tried, the plaintiffs principally, though not exclusively, strived to prove that Travenol's hiring of operatives discriminated against blacks because of the minimum requirement of a tenth-grade education. See Payne v. Travenol Laboratories, Inc., 416 F.Supp. at 255. Proof of such disparate impact discrimination under Title VII is governed

by Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Griggs holds that a facially neutral employment practice that imposes a greater burden on one group than another violates Title VII unless the employer establishes that the practice arises from business necessity. A disparate impact plaintiff need not show intentional discrimination. 401 U.S. at 430-32, 91 S.Ct. at 853-54. A large quantity of Payne's evidence was aimed precisely at the Griggs elements of proof. Of course, Payne also introduced testimony and statistics undertaking to show the opportunity for and the existence of subjective, intentional discrimination in Travenol's hiring process-disparate treatment.

[26] Confronted with this evidence, the district court found that Travenol hired proportionately fewer blacks, stating: "This disparate result reflects the effect of a tenth-grade requirement and of the

defendants' subjective discrimination." 416 F.Supp. at 248. The district court then struck down the tenth grade requirement, rejecting Travenol's business necessity defense. In Payne I, we reversed the injunction against the tenth-grade requirement, holding that no named plaintiff had standing to challenge it because each had a tenth grade education during the relevant period. 565 F.2d at 898-99.[24]

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24. In Payne I, Payne argued that she had standing to challenge the tenth grade requirement because she lacked a tenth-grade equivalency for 80 of the 90 days preceding her January 29, 1970 EEOC charge. We rejected this argument, reasoning that "the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal." 565 F.2d at 899.

The opinion in Payne I reveals that the parties did make some reference to the earlier suggested date of January 29, 1970 and a reference back to a period of up to ninety days preceding that date. It must be concluded, therefore, that the issue of the establishment of March 3, 1970, by the district court as the beginning date for applications of members of the class was considered by the Court in Payne I and became as a result of its holding the critical date for the class as it

(footnote continued)

[27] The removal of the tenth-grade requirement issue transformed this case dramatically. As Travenol properly contends, the case must now be analyzed as a disparate treatment case rather than a disparate impact case. In a disparate impact case,

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related to the tenth grade requirement. If the members of the class felt at that time that the decision was wrong because the precise date was wrong and that, therefore, they did have members of the class who did not have the tenth grade requirement or its equivalent at a proper date for the class they had the obligation to pursue their position further. They were required to raise that specific issue upon a motion for rehearing to this Court at the end of Payne I. Otherwise, the holding became and still continues to be the law of the case (Conway v. Chemical Leaman Tank Lines, 644 F.2d 1059 (5th Cir. 1981)) on that one issue. The parties cannot now be heard to urge that the tenth grade requirement as it relates to the class can be based upon a commencing date other than the one which was before the Court and upon which the Court clearly relied in making its decision.

This conclusion is buttressed by the fact that the issue of the validity and application of the tenth grade requirement was not raised upon the current appeal and is not before us. We, therefore, have considered the matter as to the proper date for the inception of the class only as it applies to issues other than the invalidated tenth grade requirement. That issue is foreclosed by Payne I.

the plaintiff need not prove intent to discriminate, while in a disparate treatment case, such proof is crucial. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977). The plaintiffs' proof must now be tested under disparate treatment principles.

With the removal of the tenth-grade requirement as an issue in this case, Payne's essential challenge is that Travenol's subjective interviewing process led to discrimination. Payne does not assert that Travenol applied distinct, facially neutral criteria to candidates in the interview that operate disproportionately to exclude blacks. Rather, Payne points to the absence of objective criteria and the resultant opportunity to discriminate subjectively in Travenol's hiring. In support of the contention that Travenol discriminated in

hiring, Payne recites the history of Travenol's hiring, which reveals substantial pre-Act discrimination, and compares applicant flow to actual hires, stressing the consistently lower proportion of blacks than whites hired. Payne also adverts to individual instances of discrimination. This evidence falls into the classic pattern of a classwide disparate treatment case. See Hazlewood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); International Brotherhood of Teamsters v. United States, supra; Wilkins v. University of Houston, 654 F.2d 388, 394-95 (5th Cir. 1981); Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1024-26 (5th Cir. 1981).

Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to Griggs v. Duke Power Co., supra, as Payne argues. Hiring processes that rely heavily on subjective

interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case. Payne does not urge that Travenol has violated Title VII by seeking alert, capable operative workers; rather she charges that Travenol masked its intentional discrimination by purporting to screen applicants for these qualities while actually discriminating on the basis of race. Subjective discrimination in interviewing or in similar evaluation processes has repeatedly been held to fall into the disparate treatment branch of Title VII law. See Hazlewood School District, supra, 433 U.S. at 304, 97 S.Ct. at 2739-40; Pouncy v. Prudential Insurance Co., 668 F.2d 795, at 801 (5th Cir. 1982)(subjective evaluation of employees is not a selection procedure tested under the disparate impact model); Wilkins v. University of Houston, supra, 654 F.2d at 394-94; Phillips v. Joint Legislative

Committee, supra.

[28-30] Because this case now raises claims of classwide disparate treatment, we must evaluate the evidence in light of standards established by the Supreme Court in such cases as Teamsters and Hazelwood. See Pouncy v. Prudential Insurance Co., supra. Teamsters and Hazelwood establish that in a Title VII disparate treatment class action, the plaintiff has the burden of proving a prima facie case that the defendant's regular practice was to discriminate intentionally against a protected class. The burden may be met solely with statistics if they show a sufficiently great disparity between the employer's treatment of blacks and of whites---a disparate result. In such circumstances, statistics alone justify an inference of discriminatory motive. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66, 97 S.Ct.

555, 563-64, 50 L.Ed.2d 450 (1971). The statistical showing of disparate result may also be buttressed with evidence of a history of discrimination practiced by the employer, individual instances of discrimination, and opportunities to discriminate that exist in the employer's decision-making processes. If the statistical disparity is insufficient alone to establish a prima facie case, the plaintiff may get over his or her initial hurdle by combining statistics with historical, individual, or circumstantial evidence. See EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981).

[31] Once the plaintiff has shown a prima facie case that the employer has pursued a policy of discrimination, the employer may undertake to rebut this showing. The rebuttal can proceed along two fronts. First, proof that the plaintiff's statistics are inaccurate or insignificant may dispel the plaintiff's proof of disparate

result. For example, the employer may show that the disparity between the percentage of minorities in his work force and in the general population results from discrimination before the enactment of Title VII. Second, the employer may seek "to provide a nondiscriminatory explanation for the apparently discriminatory result." Teamsters, 431 U.S. at 360 n.46, 97 S.Ct. at 1867 n.46. General assertions of good faith or of hiring only the best applicants, however, are insufficient to meet this burden. Id. at 342 n.24, 97 S.Ct. at 1858 n.24. If the employer fails to rebut the plaintiff's case, the district court may conclude that Title VII has been violated. Id. at 361, 97 S.Ct. at 1867.

[32] Discriminatory treatment claims under § 1981 are measured by the same standards that apply to discriminatory treatment claims under Title VII. Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th

Cir. 1982); McWilliams v. Escambia County School Board, 658 F.2d 326 (5th Cir. 1981). Thus, we apply the Teamsters pattern of proof to the § 1981 claims as well as the Title VII claims in this case.

The defendants argue that because this is a disparate treatment case, the burdens of proof and production must conform to the model established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).[25] We have held,

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25. Burdine holds that an individual seeking to prove discriminatory treatment must establish a prima facie case according to McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). The defendant then has the evidentiary burden of articulating a reasonably specific, legitimate reason for its action. If the defendant meets this burden, the plaintiff then must show that the defendant's reason is a pretext for discrimination. See McWilliams v. Escambia County School Board, 658 F.2d 326 (5th Cir. 1981).
(footnote continued)

however, that McDonnell Douglas and Burdine establish the model of proof only for an individual disparate treatment case. In a class action we adhere to the pattern of proof set out in Teamsters and Hazelwood. Our cases have recognized the distinction between individual and class claims of disparate treatment, see Phillips v. Joint Legislative Committee, supra, 637 F.2d at 1024-27 (5th Cir. 1981), and have consistently applied the Teamsters model of proof to the class claims, e.g., Markey v. Tenneco Oil Co., 635 F.2d 497, 499 (5th Cir. 1981). Nothing in Burdine, a single-plaintiff case, suggests that the Court intended Burdine procedures to supplant the procedures for proving classwide disparate treatment announced in Teamsters and Hazelwood. See

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The Third and the Ninth Circuits have applied Burdine to Title VII class actions. See Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (en banc); Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981).

Vuyanich v. Republic National Bank of Dallas, 521 F.Supp. 656 (N.D.Tex. 1981).

[33] We now turn to the question whether the district court's findings support an inference of classwide disparate treatment under Teamsters. In answering this question we recite the statistical and other facts reported in the opinion of the district court that can, if supported in the record, establish discrimination absent the tenth-grade requirement. Travenol asserts that the district court made a finding of discrimination only by overlaying the disparate effects of the tenth-grade education requirement and the subjective screening accomplished through interviewing. Because the district court never considered the independent effect of interviewing, Travenol maintains, there is no finding that interviewing, without regard to the tenth-grade requirement, is discriminatory.

The district court's findings, by its own admission, are "brief and to some extent conclusory." 416 F.Supp. at 255. Nevertheless, we believe that they are adequate to support a conclusion of classwide discrimination, without regard for the tenth-grade requirement.

First, the district court found that Travenol hired proportionately fewer blacks than whites from candidates referred by MSES.[26] Because MSES referred only candidates possessing a tenth-grade education, this finding is untouched by our holding in Payne I that the plaintiffs could not challenge the tenth-grade requirement. The district court also found that after Travenol ceased to require referral from MSES,

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26. The district court cited no statistics to support this finding of disparate result. We consider later whether this finding is clearly erroneous in light of the statistics submitted by the parties.

its hiring continued to exclude blacks disproportionately.[27] This finding reflects both Travenol's imposition of the tenth-grade requirement and its subjective discrimination. The court, therefore, did not state how much of Travenol's disproportionate exclusion of blacks was attributable to subjective discrimination, but its finding clearly implies that some of it resulted from such discrimination.

In addition to these findings, the court relied on work-force statistics.[28]

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27 The court found that Travenol hired one of three white applicants but only one of six black applicants between April 1971 and August 1974.

28. The statistics relied on by the court showed the following percentages of whites in the operative work force:

Year	Percentage of the operative work force that was white:		
	All	Male	Female
1964	100	—	—
1966	84	—	—
1969	—	82%	89.8%
1970	—	76.6%	82.8%
1973	—	54.1%	70.1%
1974	—	37.4%	57.5%

These statistics show a slow rise in the percentage of blacks in Travenol's plant from 1964, when there were none to 1971, when blacks composed nearly 25% of male operatives and slightly more than 20% of the female operatives. After 1972, when the plaintiffs filed suit, the percentage of blacks grew rapidly.

Thus, the district court clearly found that Travenol's hiring had a disparate result, even without regard to the tenth-grade requirement. Although its statistical findings are not elaborate enough to permit us to conclude that Payne established a prima facie case through statistics alone, the court also made historical, circumstantial, and individual findings that buttress the statistics. The findings of disparate result coalesce with Travenol's history of discrimination, the opportunities in its hiring process to discriminate, and individual instances of discrimination, all

to establish a prima facie case.

[34] Travenol's entire work force, but for custodial positions, was exclusively white until 1964.[29] Before 1964, Travenol hired persons, without regard to educational requirements, based on subjective impressions gained through interviewing. Community references were used heavily in the plant's early years, but took on less importance in the 1960s. Following the passage of Title VII in 1964, the plant's personnel manager sought the assistance of MSES in evaluating how Travenol could bring blacks into the operative work force. MSES performed a study and recommended that Travenol require a twelfth-grade education for operative positions. Travenol refused to set such a high standard, instead

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29. Although liability under Title VII cannot rest on Travenol's pre-Act discrimination, its conduct before 1964 is relevant to the interpretation of post-Act disparate results. See Hazelwood School District, supra, 433 U.S. at 309 n.15, 97 S.Ct. at 2742 n.15.

requiring a tenth-grade education or GED. It is unclear why Travenol decided that it needed any educational requirement for the first time only after the passage of Title VII. Travenol also invoked the services of MSES to screen and refer applicants to the plant.

Between 1965 and 1971 Travenol considered only those applicants referred by MSES. The referred applicants were then interviewed by the plant's personnel manager. Travenol's personnel manager between 1965 and 1967 hired applicants based on his interview impression and the recommendation of plant employees whom he consulted about the applicants. The first personnel manager initiated a practice of consulting a black employee, Julius Lucas, about black applicants, and this practice was continued by his successors until 1971. The personnel manager during 1967 and 1968 consulted members of the local community as references to

supplement his reaction to applicants gained through interviewing. The personnel manager from 1968 to 1974 made his hiring decisions almost exclusively by his subjective impression at the interview.[30] At no time either before or after Title VII's enactment did Travenol give its personnel managers written instructions on standards to apply in hiring.

The district court also found that all three of the named plaintiffs belonged to a racial minority, were qualified for the operative position they sought, and were rejected by Travenol. It is also abundantly clear from the district court's opinion that Travenol continued to hire white applicants for operative positions after these rejections. Thus, each named plaintiff fulfilled

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30. The factors considered by the third personnel manager were alleged to be "personal cleanliness, general alertness and comprehension." No fixed list of questions was used to measure these qualities; the questions varied from applicant to applicant.

the four-part test of establishing a prima facie case under McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[31] There is no indication in the district court's findings that Travenol rebutted the inferences of individual discrimination that arose from the plaintiffs' showings.

These findings, evaluated in light of Teamsters, establish a strong prima facie case of disparate treatment, absent the tenth-grade requirement. The burden then

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31. Under McDonnell-Douglas the plaintiff may establish a prima facie case of individual disparate treatment by showing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802, 93 S.Ct. at 1824. By noting that the named plaintiffs satisfied the McDonell-Douglas criteria, we do not imply that proof of individual instances of discrimination presented to support a case of class-wide discrimination must conform to McDonnell-Douglas.

fell on Travenol to rebut the plaintiffs' showing. The district court, however, made no findings that appear to us to blunt the plaintiffs' evidence. We conclude, therefore, that if the district court's findings are supported by the evidence, we are compelled to hold that Travenol's hiring violated Title VII and Section 1981.

[35] We have now decided that the district court's findings, if correct, warrant a conclusion that unlawful discrimination actually occurred. We now turn to evidence of discrimination in hiring to see if it supports the district court's findings of fact. In assessing this evidence, we apply the clearly erroneous standard to the district court's subsidiary findings of fact. Rivera v. City of Wichita Falls, 665 F.2d at 535-36. Danner v. United States Civil Service Commission, 635 F.2d 427, 430-31 (5th Cir. 1981).

[36] Travenol asserts that the district

court's finding of a disparate result in hiring is clearly erroneous in that it is unsupported by competent statistical evidence. Travenol argues that all the statistics in the record on applicant flow combine applicants who had a tenth-grade education and applicants who were without a tenth-grade education. If Travenol were correct, the district court's finding of a disparate result in hiring that was the product of discrimination in interviewing could not be sustained. The statistics in the record, however, amply support the district court's findings and we may not set them aside as clearly erroneous.

First, Payne introduced statistics that show that between November 1969 and November 1971, Travenol hired only 24.3% of black females [sic] applicants referred by MSES for operative positions and 21.0% of black males, while hiring 44.3% of the

white males and 51.7% of the white females.[32]

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32. The following chart presents the breakdown of applicants and hires:

Hiring Rates of Applicants Referred by MSES, for Assembler and Material Handler Positions, from November 3, 1969 Through November 24, 1971

	White Males	Black Males	White Females	Black Females
Total Applicants Referred	293	138	503	440
Total Referrals Hired	130	29	260	107
— Percent Hired	44.3%	21.0%	51.7%	24.3%

The calculation of standard deviations though not essential, see Rivera v. City of Wichita Falls, 665 F.2d at 545, n.21, is extremely useful. Absent explanation, standard deviations of greater than three generally signal discrimination, see Hazelwood School Dist., 433 U.S. at 311 n.17, 97 S.Ct. at 2743 n.17. Standard deviation analysis here reveals that the discrepancy between black and white hires is probative of discrimination. The observed number of hires is 7.54 standard deviations fewer than the expected number.

The "standard deviation" is a way to calculate the likelihood that chance is responsible for the difference between a predicted result and an actual result. See Castaneda v. Partida, 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498. For example, if we flip a penny one hundred times, we expect that fifty will be heads and fifty tails. If 51 flips out of 100 produce heads, we

(footnote continued)

Payne's evidence also shows that between 1970 and 1974, Travenol hired 44.9% of white operative-job applicants with a tenth-grade education, but only 25% of black applicants similarly qualified.[33] More specific statistics indicate that the disproportionate exclusion of blacks continued but was

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chalk it up to chance. But long before we get to 99 flips out of 100 producing heads, we suspect the penny. Standard deviation analysis is the mathematical means of expressing how likely it is that the penny is suspect. For hiring discrimination, the standard deviation is calculated by taking the square root of the product of the number of applicants hired times the probability of hiring a minority times the probability of hiring nonminority. In our penny example, the standard deviation is the square root of 100 times .5 (the probability of heads) times .5 (the probability of tails), or 5 [sic]. If 100 flips yield 40 heads, the observed value falls two standard deviations below the expected value. The probability of this happening by chance is less than five times in 100. Equal Employment Opportunity Comm. v. American Natl. Bank, 652 F.2d 1176, 1192 (4th Cir. 1981). The probability of 100 flips yielding 35 heads--or 3 standard deviations below the expected value--is less than one in 100. Id. Statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations. Id.

33. The plaintiffs set out the following table:

tapering towards the end of this period. In 1972 to 1974, Travenol hired 26.1% of the qualified white applicants while hiring 21.5% of the qualified black applicants.[34]

Applicants with a Tenth-Grade Education, From 1970-74, Compared With Hires Into Operative Positions, 1970-74

	Whites	Blacks
Applicants for Operative Jobs With a 10th Grade Education	1,478	2,193
Hires in Operative Jobs, 1970-74	664	548
% Hired	44.9%	25.0%

Calculation of standard deviations reveals that the observed number of black hires is 10.28 standard deviations fewer than the expected number.

34. The plaintiffs presented the following chart:

Applicants With a Tenth-Grade Education, From 1972-74, Compared With Hires Into Operative Positions, 1972-74

	Whites	Blacks
Applicants for Operative Jobs With a 10th Grade Education, 1972-74	636	1,658
Hires in Operative Jobs, 1972-74	166	356
% Hired	26.1%	21.5%

The disparity, though less than earlier years,

(footnote continued)

The record contains no applicant flow statistics for the period between 1974 and 1976, although the decree includes class members up to February 19, 1976, the date when the district court rendered its decision on liability.

Travenol contends that flaws in Payne's statistics render them incompetent to support the district court's findings. We do not agree that the picture of discrimination suggested by these statistics is a mirage. While Travenol has exposed defects and gaps in the plaintiffs' statistics, none of them are fatal.

Travenol lodges several objections to the MSES statistics for 1969-1971. First, Travenol argues that the MSES data omit three months of statistics for material handlers and nine months for assemblers.

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is still significant: the number of black hires falls short of the expected value by more than two standard deviations.

We have condemned "extravagant extrapolation" from small samples, Hester v. Southern Railway Co., 497 F.2d 1374, 1381 (5th Cir. 1974). In Hester, we refused to accept the inference that because 50% of the persons who responded to an advertisement over a two-week period were black that the same percentage would be found to have responded to a series of ads over a two-year period. Plainly, the gaps in proof alluded to here are not of the magnitude we condemned in Hester. Travenol also argues that MSES disclaimed certainty at trial that its data was complete. Such wavering as the witnesses displayed, however, hardly warrants discarding their evidence altogether.

Second, Travenol asserts that many of the people who MSES referred to Travenol Laboratories may never have shown up for an interview. Thus, a comparison of referred applicants to actual hires omits an important variable: how many applicants Travenol

failed to interview because they did not show up. Theoretically, this point is well taken, but its major premise is wholly speculative. Contrary to Travenol's assertion, the MSES witness did not testify that "[f]ailure to report [for an interview] was common." Rather, the witness stated that MSES records failed to indicate which applicants referred for an interview actually showed up and which did not. The following colloquy then took place between the MSES witness and Travenol's counsel.

> Q: Okay. But based on your experience the probability is that there are some who were referred and did not report, is that correct?
>
> A: Probably. I would suspect that most of these reported, but some may not have.

Thus, instead of supporting Travenol's argument, the record indicates that there was no evidence how many applicants did not keep their interview dates, and the witness in the best position to estimate believed that

most applicants did show up for interviews. Travenol also departs from the record when it asserts that the MSES witness testified that the MSES did not always keep records of hires. In fact, the testimony reveals that the opposite is true.

Travenol next objects to the applicant flow data from 1971 to 1974. Travenol's leading attack is that the figures are marred by duplicate applications. Rebecca Allen, the secretary for Travenol's personnel director, testified that approximately 25% of the applications in the applicant flow charts were duplicates. Relying on Robinson v. Union Carbide Corp., 538 F.2d 652, 658 (5th Cir. 1976), Travenol contends that this level of duplicates precludes the use of applicant flow statistics.

This contention, however, is too broad. First, Robinson reached the conclusion that applicant-flow statistics were inadequate on the basis of testimony not only that

duplicates existed but also that some applicants filled out three or four applications a month. This degree of repetition might well render applicant-flow statistics suspect. Rebecca Allen's estimate that approximately 25% of the applications were duplicates, however, does not. Her earlier testimony established that only when an application expired did an applicant have to fill out a new application; otherwise the old application was renewed.[35] Second, and more important, Rebecca Allen specifically testified that she did not know whether black duplicates exceeded white duplicates. Thus, there was no testimony that black duplicates occurred at a greater rate than white duplicates, and we are unwilling to make such an assumption without evidence in the record to support it.

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35. Applications remained current for ninety days in 1974 and later years. Before 1974, applications were considered current for thirty days.

Therefore, Rebecca Allen's estimate of duplicates is not enough to render the applicant flow statistics incompetent.[36]

[37] Travenol also contends that comparisons between black and white rates of hire are not relevant because they fail to isolate class members: black females. Travenol relies on Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980). Jefferies does not support this contention. In Jefferies we held that a black female plaintiff is entitled to prove that she suffered discrimination as a black female, even if the employer did not discriminate against either blacks as a class or females as a class. Id. at 1032. We did not imply, however, that a black female may not claim and prove that

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36. Even if we assume that 25% of the applications were duplicates, Travenol still hired 59.8% of the white applications while hiring only 33.3% of the black applicants between 1970 and 1974.

her employer discriminated against her solely because of her race or sex. In fact, the Jefferies court addressed the plaintiff's claim that she had suffered separate racial and sexual discrimination. Thus, Travenol's objection to Payne's racial statistics is unsound. While Payne's statistics are not perfect, we find that they clearly suffice to support the district court's findings of a disparate result.

[38, 39] We note, however, two areas that the district court must address on remand. First, Payne argues that Travenol discriminated from 1966 to 1969, relying for statistical evidence of applicant flow solely on an affirmative action plan prepared by Travenol. The district court apparently never ruled on the admissibility of this plan, which Travenol claims is privileged. On remand, the district court must rule on the admissibility of the plan and must make findings of fact and

conclusions of law on Travenol's hiring practices between 1966 and 1969. Second, the district court awarded constructive seniority relief to all black females who applied to Travenol before February 19, 1976, but made no findings that support a conclusion that discrimination continued beyond 1974. In the absence of findings covering this two year hiatus, we cannot decide whether such relief was warranted. We therefore must remand to allow the district court to prepare findings to explain its award, or to modify the decree. See Falcon v. General Telephone Company of the Southwest, supra, 626 F.2d at 381-82.

[40] Travenol argues that it rebutted the plaintiff's evidence of discrimination and the district court erred in refusing to accept the rebuttal evidence. We have interpreted Teamsters' view of rebuttal evidence to mean that:

> [O]nce the plaintiff has offered some evidence of disparity, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

Falcon v. General Telephone Company of the Southwest, 626 F.2d at 301. Travenol offered two statistical alternatives in rebuttal, but the district court was not persuaded. We find that the district court's rejection of Travenol's evidence was not clearly erroneous.

First, Travenol presented statistics that it hired equal proportions of blacks and whites among applicants with their own means of transportation.[37] The difficulty with these statistics is that Travenol's interviewers did not always ask applicants about their own means of transportation, particularly if the applicant received a low interview rating. Thus, Travenol cannot show that applicants it screened out in the

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37. Travenol also removed duplicate applications in computing these proportions.

interview lacked transportation. Moreover, the sample from which the defendant drew its conclusions excluded one-fourth of all applications for the time it covered. The defendant's witness could not testify that the missing applications were removed randomly. Hence, a large number of applications were excluded from the defendant's study without any showing that statistics about the remaining applications reflected the entire applicant pool. These weaknesses detract significantly from the value of the defendant's showing.

[41] Second, Travenol contends that its hiring of blacks equaled or exceeded the percentage of blacks among qualified persons in the population. Those population figures, according to Travenol, rebut the showing of disparate result in applicant flow statistics. We have held that an employer may repel a finding of discrimination by showing that the proportion of minorities in its

work force equals or exceeds the proportion of minorities among the qualified population. Robinson v. Union Carbide Corp., supra, 538 F.2d at 658. Robinson compared general population figures to work force figures, however, only after concluding that the plaintiff's applicant flow statistics were flawed by excessive duplicates. Id. Here, by contrast, we have concluded that the plaintiff's applicant flow statistics survive the employer's attack on their validity. Applicant flow figures are more revealing of an employer's hiring practices than general population comparisons when, as here, a greater percentage of qualified blacks apply for work than qualified whites. Travenol has an obligation not to discriminate illegally among applicants who present themselves for work. Because of the heavy minority applicant flow, Travenol cannot show that it discharged this obligation by presenting evidence that the composition of

its work force mirrored that of the qualified general population.

[42] Travenol's final line of defense against a finding of discrimination is to argue that interviewing was necessary to select alert, capable workers for its plant. Travenol produces and packages drugs, largely intravenous solutions. There is, therefore, obvious danger to human life if the drugs are contaminated or improperly labeled. Travenol argues that only through subjective interviewing could it secure qualified workers. We recognize Travenol's interest in minimizing the risk of hiring careless employees. But to recognize this interest is not to sanction the discriminatory practices demonstrated by the plaintiffs' evidence.

We have repeatedly held that "hiring procedures [that] rely heavily on the subjective judgments of its executives from personal interviews [create] a procedure

that can easily be used to mask racially motivated hiring decisions." Phillips v. Joint Legislative Committee, supra, 637 F.2d at 1026. This is particularly true when an all-white supervisory staff conducts the interviews, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 240 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). Travenol's occasional consultation of a black employee does not alter the control exercised by the white personnel staff. Travenol's assertion that interviewing was necessary amounts to no more than a claim that Travenol used interviewing to select only the best applicants. The Supreme Court rejected such a defense in Teamsters, and we similarly reject it here. Except as noted, we affirm the district court's award of relief for discrimination in hiring.

B. Discrimination in Initial Assignments

[43] We now address the claim that

Travenol discriminated in the initial assignment of those hired. Payne argues that the district court erred in denying injunctive relief against the disproportionate assignment of blacks to custodial jobs. The district court's 1976 opinion makes no findings or conclusions on discrimination in this area. The magistrate's 1980 report and recommendation for further relief rejected Payne's request, finding no statistical foundation for it, and the district court adopted the report as its own opinion. We agree that the plaintiffs' evidence is not sufficient.

The magistrate noted that as of November 30, 1979, blacks composed 61.9% of all operatives and 70.8% of all custodians. Believing this disparity to be insignificant, the magistrate denied injunctive relief. We do not hold that an 8.9% disparity is necessarily insignificant. We agree, however, that the disparity between the

percentage of minorities in Travenol's operative work force and the percentage in its custodial work force does not make out a prima facie case. While a concentration of minorities in the lower echelons of an organization ordinarily is probative of discrimination, here there is no showing that those assigned to the custodial work force had a tenth grade education, and were thus qualified for operative work when that requirement was in effect. Moreover, the disparity between the percentage of blacks in operative work and in custodial work has been steadily narrowing.[38] We are therefore

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38. The plaintiffs prepared the following chart from Travenol's EEO-1 reports:

Date of EEO-1 Report	Job Categories	Number of Employees	Number of Black Employees	% Black
November 30, 1977	Operatives	1,532	880	57.4%
	Service Workers	87	67	77.0%
November 30, 1978	Operatives	1,097	658	60.0%
	Service Workers	63	48	76.2%

(footnote continued)

unable to draw conclusions on Travenol's assignment policies from bare work force statistics.

The only other statistics cited by plaintiffs show that between 1967 and 1974 Travenol assigned 6.8 of the blacks hired for entry level work to custodial jobs, while assigning only 0.7% of the whites to custodial jobs. These figures are suggestive but do not persuade us that Travenol discriminated in initial assignments of custodial workers. First, the sample is very small; Travenol averaged seven assignments to custodial work each year during the period covered by these statistics. Second, the plaintiffs admit that half of the blacks assigned to custodial work lacked a tenth-

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Date of EEO-1 Report	Job Categories	Number of Employees	Number of Black Employees	% Black
November 30, 1979	Operatives	1,109	687	61.9%
	Service Workers	65	46	70.8%

grade education and, therefore, were not eligible for operative positions. These factors considerably erode the strength of the plaintiffs' proof on this point and the district court did not err in refusing to grant injunctive relief.

C. Discrimination in Promotions

In this section we address Payne's contention that Travenol structured its procedure for advancing from assembler to material handler in a fashion that discriminated against females, and her contention that black females suffered discrimination in promotions above the operative level.

1. The "Hooks" Position

Payne claims that female assemblers were impeded from entry into the material handler work force by the defendant's use of the "hooks" position as the entry job. At the time of the trial in 1976, Travenol had a material handler position that required lifting many bottles on and off the

production line with plastic devices called "hooks." The "hooks" enabled a user to lift more bottles at a time than could be lifted by hand. The hooks position was arduous; it demanded more sustained heavy lifting than any other material handler slot. When filling material handler vacancies other than the hooks, Travenol gave priority to hooks bidders even though any operative employee could bid for the position. Since hooks workers rarely declined the opportunity to transfer, "[t]his right of first refusal ha[d] the effect of transforming any material handler vacancy into a vacancy on the 'hooks' jobs." 416 F.Supp. at 262. The district court also found that females were deterred from applying for material handler positions, and those who did were forced by the hooks position to retreat back to assembler jobs much more often than men. The court therefore concluded that the use of the hooks position as the entry into

material handling unlawfully discriminated against females.

[44, 45] In response to a Food and Drug Administration investigation in 1975 Travenol abolished the hooks position and replaced it with the "bottle stack on, bottle stack off" position. The "bottle stack" position also involves putting bottles on the line and taking them off, but is less physically taxing than the former hooks position. Travenol also ceased to give bottle stackers priority in bidding for other material handler positions. Travenol denies that the hooks position did discriminate against women, and maintains that in any event the new bottle stack position is not sexually discriminatory. We affirm the district court's conclusion that the hooks position discriminated against females, but agree with Travenol that its modifications of this position remove its discriminatory

character.[39]

The plaintiffs presented statistics that more females leave the bottle stack position than men. The plaintiffs also presented testimony of two females who were loath to accept bottle stack positions because they require much more physical effort than other material handler positions. While this evidence indicates that bottle stacking is still undesirable, we have no warrant for overturning the magistrate's judgment, approved by the district court, that no injunctive relief against it is warranted. Because females no longer must

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39. The impact of the "hooks" on women was particularly severe because until 1968, Travenol had steered women into the lower paying job of assembler and men into the higher paying job of material handler. The overt sex requirements were dropped in 1968, but the impressions left in the minds of applicants resulted in no males applying for the assembler job and no females applying for the material handler job until 1971. By 1974 there were 630 female and two male assemblers, and 226 male material handlers but only seven female material handlers.

become bottle stackers in order to ascend to other material handler positions, the discriminatory effect created by the hooks position is not present.

2. Promotions Above the Operative Level

The district court found Travenol guilty of a variety of discriminatory promotion practices, and the decree we review today contains provisions designed to enjoin this discrimination. Travenol argues that the evidence failed to establish the existence of racial discrimination in promotions, and, therefore, the relief directed to this issue should be struck down.

The district court relied on two major categories of evidence in concluding that Travenol discriminated in promotions. First, the district court cited statistics that leave no doubt that Travenol's work force above the operative level was virtually all

[Text of Opinion Continues on

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white through 1974.[40] Second, the district court examined Travenol's promotion procedures and found them marred by the same opportunity for subjective discrimination that existed in the hiring process. Travenol attacks both findings on appeal.

[46] Travenol argues that work force statistics are not properly considered in assessing discrimination in promotions because we determined in Payne I that many positions above the operative level were filled in part by lateral hiring. 565 F.2d at 895. In Payne I, we held that the district court

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40. More recent statistics also reveal a concentration of blacks in the lower paid positions in Travenol's plant. While whites constituted 38.1% of the operative work force in 1979, the following statistics show their proportions in other positions in the plant:

August 1979

Job Level	No.	% White
Officials & Managers	66	83.5%
Professionals	26	72.2%
Technicians	17	70.8%
Office & Clerical	44	77.2%
Craftsmen	122	68.2%

did not err in measuring the disparate impact of Travenol's twelfth-grade requirement for positions above the operative level by reference to general population figures. We noted, however, that "the large majority of the employees occupying positions subject to the twelfth grade requirement were promoted from operative jobs...." Id. Thus, it is plain that work-force statistics are relevant to the impact of Travenol's promotion procedures. See Johnson v. Uncle Ben's, Inc., supra, 628 F.2d at 425 (when positions are filled both by lateral hiring and by promotion, "[a]s a general matter ... cases are dealt with in terms of the extreme [exclusive promotion or exclusive lateral hiring] to which they most closely accord").

[47] Travenol also attempts to rebut the work-force figures by presenting statistics on actual promotions. Travenol's evidence is that 23.2% of all promotions between 1970

and 1974 went to blacks, and during this period blacks averaged 29.9% of all operatives. The district court apparently rejected these rebuttal statistics, and the record supports this evidentiary choice. The testimony of the defendant's witness shows that the charts from which Travenol drew its statistics are flawed by a failure clearly to categorize the positions filled through promotions, and by omissions in entries. These errors detract from the force of the defendant's proof, and the district court's decision to reject it is not clearly erroneous.

[48] Travenol next argues that the process through which it selected operatives for promotions was free from bias. The district court's finding that Travenol did have the opportunity to discriminate in promotions, however, is well supported by the evidence and by our cases. The district court found that Travenol's failure to post notice of

openings, and its reliance on the recommendations of supervisors, the length of an employee's service, and educational requirements in making promotion decisions all operated discriminatorily. We affirmed the district court's conclusion that the educational requirements were discriminatory in Payne I, and we do not further address them here.

[49] Travenol argues that the failure to post notice of job vacancies is irrelevant because it did not consider requests for promotions to supervisory positions, and did not require applications for promotions to office, clerical or technical positions. The district court concluded, however, that job vacancy exposure was greater among whites than blacks. Even if applications were not required for certain positions, when most of the supervisors are white, failure to post job vacancies can only discourage applications by blacks to a greater

degree than it discourages whites, who garner information through the grapevine. See, e.g., Long v. Sapp, 502 F.2d 34, 41 (5th Cir. 1974).

[50] The district court found that a major factor in promotions, the supervisor's recommendation, was delivered without guidance by any objective standards and operated to discriminate. "This court has recognized that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination." Fisher v. Proctor & Gamble Manufacturing Co., 613 F.2d 527, 544 (5th Cir. 1980); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 330 (5th Cir. 1977). We uphold this finding of the district court.

[51] The district court also found that Travenol's consideration of length of service as a criterion for advancement tended to perpetuate past discrimination in the hiring of operatives. Travenol

argues that under the Supreme Court's decision in Teamsters, supra, the district court improperly premised Title VII liability on the length-of-service factor. Teamsters holds that a bona fide seniority system does not violate Title VII merely because it perpetuates the effects of discrimination before the enactment of Title VII. 433 U.S. at 352-54, 97 S.Ct. at 1863-64. We see no application of Teamsters to the instant case. Travenol's informal and erratic reliance on length of service falls far short of being a bona fide seniority system under the statute and under Teamsters.

The district court's finding of discrimination in promotions must be affirmed.

D. Discrimination in Merit System Pay

For professional, technical, clerical, and supervisory positions, Travenol determines salary subjectively according to its merit pay system. Payne argued below that

Travenol discriminated against both blacks and women in setting merit pay salaries. The district court did not address this point in its 1976 opinion, but implicitly rejected the plaintiffs' claim when declining to accept proposed findings of fact and conclusions of law with respect to it in 1976. Payne now asks us to reverse the district court's implicit exoneration of Travenol on the merit pay issue.

[52] Ordinarily we would be reluctant to decide an issue on which the district court was silent. In this instance, however, we affirm the district court's refusal to find discrimination in merit pay. Payne has called no statistics to our attention upon which a finding of discrimination can be based. Payne compares several sets of statistics that show disparities between the pay of blacks and whites or between males and females. Each comparison, however, looks at groups that differ in

significant ways in addition to race or sex. For instance, Payne asserts that among employees with a twelfth-grade education, white males make $2,757.11 per year more than black females. Payne does not tell us, however, how many years the white males have worked compared to the black females. Nor does she compare white males to black females who occupy the same job category. Yet length of service and job category could clearly account for the pay differential without regard to race or sex. Finally, the comparison of black females and white males includes all job categories at the plant, not only merit pay jobs. The average salary of all jobs tells us little about inequities, if they exist, in merit pay jobs.

Similar criticisms can be leveled at every example of disparities in merit pay that Payne alleges.[41] We need not engage

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41. Without reviewing in detail here all of Payne's exhibits, we make the following

(footnote continued)

observations on her statistics. Payne states in her brief that "black female Craftsmen were paid an average of almost $600 a year less than white female Craftsmen, and white female Craftsmen were paid an average of $1324 less than white male Craftsmen." Looking at the exhibits, we are unable to tell how long any of the craftsmen have been working, a fact that is certainly relevant to their salaries. Moreover, we note that there is only one black female craftsman on the exhibit. We recognize that Travenol's discriminatory promotion policies account for the paucity of black females in merit pay jobs. But the small number of them--one in the category of craftsmen--makes it difficult to prove disparities in pay statistically.

Payne also relies on exhibits for proof of patterns of disparate merit pay. These exhibits show the date of hire, date of hire for the merit pay job, and the sex, race, and salary of each employee in a merit system job category during 1973 and 1974. All but two job categories contain no black females. In one category, inventory clerk, the sole black female is paid more than the average white female; no males are employed as inventory clerks. In the other category, accounting clerks, the sole black female makes twenty two cents an hour less than the average hourly amount made by white females; again, no males held this job. Our review of the chart reveals that only one white female with less seniority than the black female made more than the black female did. The figures for 1974 are more equivocal. In that year, white females received an average raise of thirty five cents an hour; the black female's raise was only fifteen cents per hour. While this fact is suggestive, it is too slender to support a condemnation of an entire system of setting salaries.

in a sophisticated analysis to conclude that Payne has failed to isolate the influence of sex or race on merit pay at Travenol. Thus, the showing is insufficient to entitle her to relief and we affirm the district court's denial of it.

III. CHALLENGES TO THE RELIEF ORDERED

Payne raises a number of challenges to the relief ordered in the decree. We have considered each of these objections and conclude that in most aspects, the district court did not abuse its discretion in shaping relief. Two objections with respect to constructive seniority, however, have merit.

[53] Paragraph 10(a) of the decree provides that notice shall be given to each black woman currently working in an hourly job at Travenol "who applied for employment prior to February 19, 1976, and was not hired by that date."[42] Payne correctly urges that

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42. We recognize that February 19, 1976 is
(footnote continued)

a class member whose date of hire was delayed by discrimination but who was eventually hired before February 19, 1976 is also entitled to constructive seniority. The decree must allow a black female operative who applied to Travenol during the time that unlawful employment practices prevailed at Travenol's plant to make a prima facie showing that she would have been hired earlier but for discrimination, even if she was in fact hired before the date when Travenol ceased to violate Title VII. Such a showing is made if the time between her application

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used in the decree because the district court found that discrimination had ended by the date it rendered its decision on liability. We hold in II.A, supra, that the district court did not make findings that support a conclusion of discrimination in hiring beyond 1974. We therefore are remanding to permit the district court to make findings that underpin its conclusion that discrimination continued until 1976, or to modify its conclusion. The decree, of course, must reflect any alteration that the district court makes in the ending date for discrimination at Travenol. We use February 19, 1976 in this opinion as a proxy for the date eventually selected by the district court.

and date of hire is longer than the average waiting time for white applicants who applied the same time she did.

[54] Paragraph 11 of the decree provides that employees laid off and awaiting recall shall be recalled by seniority date, whether actual or constructive.[43] The use of constructive seniority, we find, must go further than the decree provides to afford a complete remedy. Under the decree an employee with normal seniority could fare better than a class member with equal constructive seniority if the employee with

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43. The decree provides:

> Any class member who is entitled to constructive seniority under the provisions of paragraph 10 as a result of discriminatory delay in her hire, and who has been laid off and not been recalled as of the effective date of this Decree, shall be recalled in accordance with her constructive seniority date and the plant or constructive seniority dates of the other employees laid off. The employees whose seniority is to be compared are the employees in competition for recall with the class members in question.

normal seniority has already been recalled after a layoff while the employee with constructive seniority still awaits recall.[44] In fact, an employee with normal seniority may have escaped lay off altogether while a class member with less normal seniority (because of a discriminatory delay in hire) but equal constructive seniority has been laid off. The decree fails to make whole a class member in either situation. The decree therefore must be modified on remand to allow a class member in either position to be compensated for lost earnings.

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44. The following hypothetical situation illustrates this point: a white female and a black female applied to Travenol in 1970, and the white female was hired immediately but the black female was not hired until 1976. Both were then laid off in 1976. Travenol recalled employees in 1977 in order of seniority, and, because of her greater seniority, the white female was recalled but not the black. In 1980, the black female was awarded a constructive seniority date of 1970. Because the black female should have been recalled in 1977, had she not suffered a discriminatory delay in hire, she would be entitled to compensation for the time she awaited recall.

Travenol also challenges two paragraphs of the decree as to the nature of the relief granted. Paragraph 10(b) provides for the establishment of the constructive seniority date of an employee class member who claims that her date of hire was discriminatorily delayed beyond February 19, 1976. Travenol argues that paragraph 10 denies it the right to contest a constructive seniority date by proving that the delay in hire was not discriminatory.

[55] The parties agree that an employer must have the right to prove that an employee is not entitled to constructive seniority because her delay in hire was not caused by discrimination; they disagree whether Paragraph 10 affords Travenol that right. The decree now establishes a means of calculating the presumptive constructive seniority date, then allows Travenol to suggest an alternative date. To remove any ambiguity, the district court on remand should

modify paragraph 10 to provide explicitly that Travenol may dispute a class member's entitlement to any constructive seniority at all as well as to suggest a date different from the presumptive date.

[56] Paragraph 8 provides that Travenol must write to all unhired members of the plaintiff class of whom they know, invite them to reapply for a position, and give them priority over other applicants. Travenol contends that Paragraph 8 gives priority to all applicants, even those rejected for non-discriminatory reasons, and, therefore, grants the plaintiff class greater relief than it deserves. Travenol also argues that not all victims of discrimination should be given hiring priority because Travenol could not have hired all of them even if it hired only black females. Travenol must be afforded the right to contest priority by arguing that an applicant was rejected for legitimate reasons. In such disputes each

applicant class member is entitled to a presumption that she would have been hired but for discrimination. The burden will be on Travenol to prove that it rejected her for legitimate nondiscriminatory reasons. See Teamsters, supra, 431 U.S. at 360-62, 97 S.Ct. at 1867-68.

Travenol's additional objection to paragraph 8, that it grants priority to too many applicants-discriminatees, is premature. The Supreme Court noted in Teamsters that "after the victims have been identified and their rightful place determined, the district court will again be faced with the delicate task of adjusting the remedial interest of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." 431 U.S. at 372, 97 S.Ct. at 1873. The district court here will be faced with the delicate task of determining to what extent the applicant class members will be entitled to priority over innocent

current applicants.

Before the district court balances these interests, the number of applicant class members who now seek work at Travenol must be determined. It is not for us to place a ceiling on applicant class members entitled to priority. The district court must exercise its discretion in this matter after the facts have been developed more fully. We note only that the number of applicants entitled to priority need not correspond exactly to the number of black females that Travenol would have hired absent discrimination.

IV. ATTORNEY'S FEES

Payne requests that we direct an award of interim attorney's fees. See James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358-59 (5th Cir. 1977). The record reveals that the district court entered an interim fee award on December 8, 1976. This order is not now before us. Requests

for further interim attorney's fees should be addressed in the first instance to the district court.

V. CONCLUSION

In summary, we hold:

I. Our jurisdiction to review this Title VII interlocutory decree includes the power to review limitations on the scope of the class when those limits have been the basis for granting or withholding injunctive relief.

II. The district court did not abuse its discretion in redefining the class to exclude black males once the sole black male plaintiff dropped out of the case, nor was it obligated to give black males notice of the redefinition.

III. The district court erred in setting the opening date of the class. For the Title VII race and sex claims, the class should open on October 21, 1969 except as to any claims based upon the

tenth-grade education requirements. For Section 1981, the class may open on March 2, 1966, if the district court finds racial discrimination going back to that date.

IV. We affirm the findings of discrimination: (a) in the hiring of black women, and (b) in promotions, to the extent that these findings support challenged portions of the decree.

V. We remand for the district court to prepare findings and conclusions on discrimination in hiring on a racial basis from 1966 to 1969 and from 1975 to February 19, 1976 on the basis of race or sex.

VI. We affirm the denial of injunctive relief against discrimination: (a) in the initial assignment of custodians, (b) in the "bottle stack on, bottle stack off" position, and (c) in the merit pay system.

VII. We affirm the other parts of the decree, except in four particulars. First, paragraph 10(a) must provide for an

opportunity for black females who were hired before Travenol ceased to discriminate, but whose date of hire was discriminatorily delayed, to claim constructive seniority. Second, paragraph 11 must be modified to compensate class members for lost earnings when layoffs have fallen more heavily on them than on employees who were not the subject of discrimination by Travenol. Third, paragraph 8 must be modified to allow Travenol to prove that applicant class members were rejected for legitimate reasons. Finally, paragraph 10(b) must be modified to allow Travenol to prove that an operative class member's date of hire was not delayed because of discrimination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

GOLDBERG, Circuit Judge, concurring in part and dissenting in part:

I am in complete agreement with much of my brethrens' thorough, scholarly, and

meticulous opinion. The Majority has resolved many of the complex legal and factual problems presented by this protracted litigation, setting the stage at long last for a final resolution of the parties' claims. However, one aspect of the Majority's Opinion compels my dissent. The Majority has affirmed the district court's decision to exclude black males from the plaintiff class[1] and to deny them relief, without, however, permitting notice of their exclusion and in spite of a finding that black males had been the victims of unlawful discrimination. I believe that on this record, denial of relief to black males is fundamentally unfair and erroneous as a matter of law. Therefore, I must respectfully dissent.

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1. Section IIB of the Majority's Opinion ante slip op. at 1991, at ___, discusses the exclusion of black males from the plaintiff class.

I. PROCEDURAL HISTORY

A. Proceedings in the District Court:

This class action was initially brought by three named plaintiffs, (two black females and one black male) on behalf of the black employees and job applicants at Travenol Laboratories. Plaintiffs alleged that the defendant corporation's employment practices were racially discriminatory and violative of Title VII.

On November 16, 1972, the trial court conditionally certified and defined the plaintiff class to include all black Travenol employees and job applicants. On May 1, 1973, Willie Mae Payne, a black female and a class representative, amended her complaint to include charges of gender based discrimination in addition to her original claim of racial discrimination. The following week, James Williams, the sole male class representative, chose to withdraw from the case, citing "religious views."

With the addition of the sex discrimination claim, and with the sole male class representative out of the case, defendant Travenol moved that the plaintiff class be narrowed to include only black females. The district court was of the opinion that a conflict between the objectives of black males and black females might develop in the litigation and that therefore black females could not adequately represent black males. Accordingly, on December 20, 1974, the trial court conditionally granted defendant's motion and excluded black males from the plaintiff class. However, no notice was ever sent to inform the black male class members that their named representative had left the case and that henceforth they would be excluded from the action.

The case went forward to a trial on the merits, with the plaintiff class certified to include only black women. Following a trial on the issue of liability, the

district court made findings of fact and conclusions of law. The trial court found, inter alia, that Travenol had been guilty of both gender and race discrimination in hiring and promotion. Based on the evidence introduced at trial, the district court found that black females and black males had been the victims of unlawful discrimination.

Following the trial, counsel for plaintiffs renewed their request that the plaintiff class be broadened to once again include black males. However, in an order issued December 8, 1976, the trial court reaffirmed its earlier ruling on class certification. Citing the supposed conflict between the interests of black males and females, the district court persisted in its ruling that black females could not adequately represent a class which included black males.[2] Finally, on January 24, 1979, the

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2. This ruling was certified for
(footnote continued)

district court entered an order once more declining to make any change in the plaintiff class.

B. Plaintiffs' Arguments on Appeal:

Plaintiffs now appeal from the district court's ruling regarding the scope of the plaintiff class. Plaintiffs argue: (1) that the trial court initially erred in refusing to allow a black female to represent black males in this class action; (2) that insofar as the black female class representatives successfully established that Travenol had discriminated against both black females and males, the trial court erred in its posttrial rulings denying relief to black males; and (3) that in any event the trial court erred in refusing to notify

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interlocutory review pursuant to 28 U.S.C. § 1292(b). However, the Fifth Circuit, by order of February 23, 1977, denied the petition for permission to appeal from the district court's order of December 8, 1976.

absent black male class members that their sole representative had withdrawn from the suit and that henceforth they would be excluded from the action.

C. The Majority Opinion:

The Majority holds that the district court did not abuse its discretion in making its pretrial decision to exclude black males from the plaintiff class. The Majority also holds that the district court was not required to inform absent class members that their sole representative had withdrawn from the action and that henceforth they would be excluded from the case.

D. This Dissent:

As I have stated at the outset, I enthusiastically concur with much of the Majority's careful and thoughtful decision. Thus, it is only with great hesitation that I must register my disagreement with one part of this otherwise exemplary opinion. I believe the district court committed two analytically

distinct errors in excluding black males from the plaintiff class. First, the district court should not have excluded black men from a class represented by black women on the grounds of a potential conflict of interest which in fact never materialized. Second, even if the district court was correct in its theory that black women could not represent black men, the district court erred in failing to inform the absent class members that their sole representative had withdrawn from the suit and they would be excluded from the action.

Each of these errors, standing alone, mandates that the district court's decision on exclusion of black males be reversed and remanded with instructions to rectify these mistakes.

II. EXCLUSION OF BLACK MALES FROM THE PLAINTIFF CLASS: ANOTHER VIEW

A. The Pretrial Ruling:

The Majority Opinion focuses upon the

district court's pretrial decision to exclude black men from the plaintiff class. The Majority treats this decision as one within the trial court's "discretion" and concludes that the district court did not abuse its discretion in excluding black males. I do not believe that the district court's ruling should be examined under the "abuse of discretion" standard of review. It is true that "[w]hen based upon facts adduced at an evidentiary hearing," a district court's decision as to the scope of a class is reviewable only for abuse of discretion. McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981). However, class certification decisions made without the benefit of such a factual record are accorded less deference. See Geurine v. J & W Inv., Inc., 544 F.2d 863, 864-865 (5th Cir. 1977); Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975); Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114, 117 (5th Cir. 1975).

In this case, the district court did not consider any testimony or evidence bearing on the existence of an actual antagonism between male and female class members.[3] Because the trial court did not rely upon live testimony or evidence, we can only assume that the trial court was of the opinion that there was an inherent conflict between the interests of black males and females and that a black female could not adequately

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3. "Rather than determining the question of conflict abstractly, the court must examine the interlacing allegations of race and sex discrimination to determine whether an actual conflict exists." Ante, slip op. at 1993-1994, at ____ - _____. District courts considering the problem of mixed race and sex discrimination class actions have consistently held that a conflict of interest is not inherent, but is a question of fact to be determined through evidentiary proceedings. See, e.g., Vuyanich v. Republic National Bank of Dallas, 82 F.R.D. 420, 434-435 (N.D. Tex., 1979); Strong v. Arkansas Blue Cross & Blue Shield, 87 F.R.D. 496 (E.D.Ark. 1980); Hammonds v. Folger, 87 F.R.D. 600 (W.D. Miss. [sic] 1980); Edmondson v. Simon, 86 F.R.D. 375 (N.D.Ill. 1980). No such evidentiary hearing was held in this case. Thus, the factual record was not sufficiently developed to support a finding of an actual conflict which would justify exclusion of black males.

represent black males during any phase of the trial. I believe that this was a conclusion of law, and is reviewable as such.

The trial court's decision to exclude black men was based on a mere hypothesis that a conflict might develop between male and female class members if females were allowed to compete with males for the better paying jobs of material handler. This is not a case where the testimony of the named plaintiffs revealed identifiable antagonism toward other class members.[4] Thus, I believe that this is a case of mere possible and not actual conflict.

Not only was this a case of mere potential conflict, upon careful examination it

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4. Compare, e.g., Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496 (E.D.Ark. 1980) (black female plaintiff's testimony reveals that other female employees were beneficiaries or perpetuators of discrimination); Hammons v. Folger Coffee, Inc., 87 F.R.D. 600 (W.D.Mo. 1980) (black female plaintiffs' allegations that other female employees were promoted over her reflected actual conflict).

is clear that the conflict itself is in large part illusory, since the district court's fear of potential conflict among class members was premised upon an erroneous understanding of Title VII law.

In ruling that black men would be excluded from the plaintiff class, the district court reasoned that plaintiffs would try to prove at trial that women were disproportionally excluded from the better-paying material handler jobs. Therefore, the court concluded, women could not represent any black males ... "who may have an interest in retaining their jobs as material handlers." (Emphasis added) ante, slip op. at 1991, n.8, at____, n.8. The trial court apparently assumed that black women plaintiffs would seek to take material handler jobs away from black men who held those positions. This assumption is incorrect. A remedial order could only affect future job placements; it could not remove incumbent material handlers

from their jobs. See United States v. Hayes International Corporation, 456 F.2d 112, 118 (5th Cir. 1972); Local 189, United Papermak. & Paperwork v. U. S., 416 F.2d 980, 988-989 (5th Cir. 1969).[5] Thus, there would be no conflict between the interests of black females who might seek future positions as material handlers and that of black males already holding the jobs.

In fact, the only potential conflict I can find in this case is that of competition between black males and females seeking material handler jobs. However, the "conflict" among these class members is indistinguishable from the conflicts inherent in

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5. In Local 189, United Papermak. & Paperwork v. U. S., supra, an early Title VII case, this Court rejected plaintiffs' argument that blacks should displace white incumbents who held jobs to which blacks were entitled. The Court adopted instead the "rightful place" remedial theory. "The 'rightful place' doctrine requires that qualified blacks be given a preference for future vacancies in positions they would have occupied but for wrongful discrimination." James v. Stockham Valves & Fittings Co., 559 F.2d 310, 356 (5th Cir. 1977).

any Title VII class action. Whenever a Title VII plaintiff class prevails, the class members are thrown into competition with one another, as well as with non-class members, for a limited number of jobs. However, as the Majority acknowledges, this Court has consistently rejected the contention that job competition among class members creates a conflict sufficient to defeat class certification under F.R.Civ.P. Rule 23. See, ante, slip. op. at 1992, n.10, at_____, n.10.[6] To hold otherwise would effectively

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6. Competition between employees and applicants for jobs is only one form of conflict which may arise in a Title VII class action. There are numerous other examples of divergent interests among class members at the relief stage of Title VII litigation. For instance, class members are likely to disagree about the formula chosen for computing back pay, since one method may favor less skilled workers over highly skilled workers; while another method could disadvantage formerly employed class members at the expense of current class members. See Crowley, "Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest," 59 B.U.L. Rev. 661, 664-666 (1979). Different techniques for calculating retroactive seniority, and for restructuring defendants' lines of progression may also become the basis for conflict among class

(footnote continued)

destroy the class action as a procedural device for enforcing Title VII rights, for it is impossible to imagine a Title VII class action that does not involve a potential conflict among class members at the relief stage of the litigation.[7]

The inevitability of conflict among Title VII class members over forms of relief should not be a cause for alarm. Rather than dictating the downfall of class actions,

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members. Crowley, supra at 666-668. Nevertheless, these types of conflicts among class members, indistinguishable from the "conflict" in this case, are not seen as grounds for decertifying class actions.

7. Under the reasoning set forth by the district court and endorsed by the majority, Willie Mae Payne was not even an adequate class representative of other black females in this action. Now that she has prevailed on the merits of her sex discrimination claim, Ms. Payne will be placed in competition with other black women class members for a limited number of material handler positions. Under the majority's reasoning, competition between class members at the relief stage of the litigation would create a conflict of interest warranting the exclusion of any black female who might be interested in applying for a material handler position. Accordingly, the class would have to be decertified. Yet despite this manifest "conflict of interest," Ms. Payne was found to be an adequate representative of the plaintiff class. 565 F.2d at 900.

such conflict has given rise to the bifurcated Title VII suit. In a bifurcated Title VII action, such as the instant case, there is a trial phase followed by a remedial phase. At the trial stage, the defendant's liability to the class as a whole is adjudicated by the class representative; whereas at the remedial stage, the class members' claims for back pay, constructive seniority, and preferential hiring are resolved on an individual basis. As Judge Medina explained in that granddaddy of all class actions, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 556 (2d Cir. 1968):

> "Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule [Rule 23] gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages."

Competition among class members for limited jobs will not affect the adequacy of representation at the initial liability stage of the trial, since the class representative

is concerned with establishing a general right to relief on behalf of all class members. Once the class representative proves that defendant's practices violated Title VII, each individual class member may come forward to establish his or her right to back pay, constructive seniority or preferential hiring. Conflicting interests among class members, i.e. competition for the same job, are taken into account in formulating relief. Thus, competition among class members can be handled on a case-by-case basis. In a bifurcated Title VII suit, such competition at the relief stage need not detract from the named plaintiff's ability to adequately represent all class members at the liability stage.

In fact, it is only through the procedural device of a class action that the competing claims of Title VII plaintiffs can be equitably resolved. The very purpose of

a class action is to gather before the court all parties entitled to relief. When all are assembled, the court can distribute relief fairly among the class members rather than awarding relief to any one plaintiff at the expense of other similarly injured individuals. See "Developments in the Law--- Class Actions," 89 Harv.L.Rev. 1318, 1366-1367 (1976) (discussing the "limited fund" theory of class actions).

As will be discussed more fully infra, the district court in this case specifically found that black males, as well as females, were the victims of unlawful discrimination. However, as a consequence of the Majority's decision, the Magistrate is now actually forbidden to consider the interests of black men in designing those portions of his proposed order which deal with individualized relief.[8] Because all the parties entitled

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8. In his Report and Recommendation, the Magistrate notes that he is bound by the court's
(footnote continued)

to relief were not gathered together in this one action, the trial court is now unable to equitably distribute the limited available relief in the remedial phase of the litigation.[9]

Finally, the Majority justifies the exclusion of black males from the class as necessary to vindicate the black males' right to be represented with "undivided loyalty" by "a class representative who is free from a desire to prove a claim that will impair their interests." Ante slip op. at 1994, at _____.

The Platonic ideal of adequate representation is realized when one attorney zealously represents the individual interests of

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definition of the plaintiff class in awarding individualized relief.

9. See generally, Developments, supra at 1476-1477. (Exclusion of class members with conflicting interests should be regarded as a technique of last resort, since a better result is reached when the outcome of adjudication is reflective of all relevant legal interests, rather than just the interests of the named plaintiffs.)

one client. Every class action is necessarily a departure from this ideal. In a class action, attorneys advocate several interests which are common to all class members. Therefore, no one class member's interests are ever represented with "undivided loyalty": counsel's loyalty is necessarily owed to the goals shared by the class as a whole.

Under this system of advocacy, there is always the danger that a class attorney will not urge all class members' interests with equal vigor. This possibility exists even in the most homogeneous of classes. For instance, as a matter of trial strategy, an attorney may choose to press the claims which are easiest or least expensive to prove, ignoring others.[10] Or, an attorney may advocate the named plaintiff's interests more strongly than the interests of absentees.[11]

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10. See generally Crowley, supra at 676-677.

11. See e.g. Gonzales v. Cassidy, 474 F.2d 67
(footnote continued)

However, the ever-present possibility of less than vigorous representation of some class members' claims has not necessitated abandonment of the class action as a procedural device for vindicating rights. Instead, the trial judge presiding over a class action is charged with the duty to protect the interests of absentees by monitoring the adequacy with which their interests are represented throughout the litigation. If at trial the class attorney does not fulfill his or her duty to adequately represent all class interests, the trial court may at that time decertify the class. Ante slip op. at 1994, at_____.

In this case, plaintiffs' attorneys sought to prove both race and sex discrimination. Of course, there was a possibility that counsel might concentrate on proving

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(5th Cir. 1973) (class attorney failed to appeal award of retrospective relief to named plaintiff only).

sex discrimination, leaving the class members' race discrimination claims to languish unproven. In that event, it would be the trial court's duty to decertify the class, so that black men would not be bound by the judgment. However, until class counsel actually proved, by their trial performance, that they would not represent both race and sex claims with equal vigor, there was no inherent reason to assume inadequate representation of black males' interests.

Moreover, I fail to see how a black female class representative had any desire to prove a claim that would impair the interests of black males, as the Majority implies. True, female plaintiffs sought to prove that they were denied material handler positions on the basis of their sex.[12] But females

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12. Plaintiffs also sought to prove that Travenol discriminated against women by requiring a mandatory six-month pregnancy leave without pay. Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248, 263-264. However, proof of this sex

(footnote continued)

also sought to prove that all blacks, male and female, were discriminated against on the basis of race in both hiring and assignments. Even if it were established that black females were doubly disadvantaged on the basis of both race and sex, it would not follow that females were thereby entitled to "double relief." Instead, both black men and women would be entitled to the same relief. Under Title VII, black males and females would have a right to remedies, such as back pay and constructive seniority, sufficient to compensate them for periods of time in which they were denied jobs they would have occupied but for discrimination, either race or gender-based. See note 5, supra. Surely, female class members are not entitled to more back pay or seniority because defendant discriminated against them on two of the grounds proscribed by Title

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discrimination claim obviously could not impair the interests of black males.

VII, rather than just one. Therefore, I do not see how females' claims of sex discrimination could impair the interests of black males.

I do not take the position that there could never be a case in which proof of some class members' claims might impair the interests of others. When one group of class members seeks relief which is substantively different from that sought by the class representative, the named plaintiff is not an adequate representative for the dissenting group's interests. An example is provided by school desegregation class actions, involving groups of black parents who are opposed to the relief sought by the class representative. While the class representative typically seeks desegregation through busing, the dissenting group may oppose busing and advocate instead other court-ordered programs which focus on educational improvement. See, e.g., Tasby v. Wright,

520 F. Supp. 683, 732-733 (N.D. Tex. 1981). See generally Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," 85 Yale L.J. 740 (1976). Under these circumstances, dissenting groups should be allowed to intevene in order to urge their separate interests. See Tasby v. Wright, supra at 689-90.

The case of Bailey v. Ryan Stevedoring Co., Inc., 528 F.2d 551 (5th Cir. 1976) is illustrative of a fundamental conflict among class members over the relief sought in an action brought to redress Title VII violations. In Bailey, three blacks brought a class action seeking inter alia an injunction ordering integration of racially segregated local stevedoring unions. 204 of the 280 members of the black union signed a petition stating they did not wish the named plaintiffs to represent them, since the union members did not want to dilute their strength by integrating with a white local. Bailey v. Ryan Stevedoring Co., Inc., supra at 553. Accordingly, this Circuit upheld the district court's decision to deny class certification on the grounds that the three named plaintiffs could not adequately represent the majority of class members' interests. Id.

In this case, there was no such conflict of interest over the fundamental goals of the litigation. Both black men and women sought to establish that defendant Travenol's employment practices violated Title VII. Both black men and women sought injunctive relief prohibiting further illegal practices, as well as individual relief to compensate for past instances of discrimination.

In sum, the district court erred in holding that, as a matter of law, the "inherent" conflicts of interest between black male and female class members rendered the latter inadequate representatives of the former's interests. Conflicts of interest between class members for a limited "fund" of relief are inherent in every Title VII class action. Also inherent in the class action system of advocacy is the possibility that class counsel might not represent all claims with equal vigor. If these types of conflicts sufficed to defeat

class certification, there could be no class actions. However, instead of sounding the death knell for this useful procedural device, the courts have developed new doctrines to protect class members from conflicts which could be inimical to their interests. A duty has developed upon the trial court to monitor the adequacy with which all class members' interests are represented throughout the trial. If conflicts in fact develop, the trial court may create sub-classes, allow intervention, or in extreme cases, decertify the class. But exclusion of black males from the class in this case surely cannot be justified on the basis of the precise type of inter-class conflict which is inherent, but tolerated, in every Title VII class action.

There was no disagreement between black men and women as to the outcome of this case: both groups sought to prove that defendant

had discriminated against them in violation of Title VII; and that accordingly, they were entitled to appropriate relief. There was no reason, based on the law in this Circuit, why a black female could not represent all black employees in their mutual jihad against Travenol Laboratories.

B. The Post-Trial Exclusion of Black Males From the Plaintiff Class:

The district court justified its pretrial decision to exclude black males from the plaintiff class on the grounds that a conflict of interest might develop during litigation. For the reasons I have set forth in Part IIA, I believe that this decision was erroneous as a matter of law. However, whatever justification there might be for the pretrial class certification decision, the trial court's post-trial order denying relief to black males cannot be sustained.

In considering the class representatives' claims that defendant Travenol discriminated

on the basis of both race and sex, the district court necessarily reviewed evidence bearing on the effect of Travenol's policies on blacks. However, the district court did not confine itself to an examination of evidence bearing upon discrimination against black women. Instead, the court specifically found that Travenol's hiring policies, educational requirements, failure to post job vacancies, and system of promotion adversely affected all blacks.[13] In some cases, the findings were actually broken down to show the specific effect of discriminatory policies on black men.[14] Thus, although black

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13. The district court found that "Travenol's failure to post notice of vacancies impedes the access of the company's black employees to the better paying and more desirable jobs," Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248, 260; and that "the procedures for promotion which defendants employ tend to perpetuate the past discrimination suffered by blacks at defendants' Cleveland plant." Payne v. Travenol, supra at 261; (emphasis added).

14. The district court found that as a result of defendant's hiring policies, in February, 1969, "...82% of the male operatives [at the Travenol plant] were white while 89% of the female operatives

(footnote continued)

males were excluded by pretrial order from the class of plaintiffs bringing this action, the district court proceeded to try the case and make findings predicated on the assumption that black men were properly included in the class. In doing so, the district judge quite properly exercised his duty to monitor the class representative and to protect the interests of absentees.

After trial, however, the district judge refused to modify his original definition of the class.[15] Instead of redefining

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were white." Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248, 257. By 1970, "... 76.6% of the male operatives were white and 82.8% of the female operatives were white." Payne v. Travenol, supra at 258. With regard to defendant's policy of requiring a twelfth grade education for office and clerical jobs, the district court found that "this requirement disqualified 81.9% of black males over 25 and 88.9% of the black females over 25 ..." Id. The requirement that applicants for certain other positions possess a college degree was found to have a "substantial adverse impact on blacks" in that "only 3.2% of black males and 3.3% of black females" over 25 had college degrees. Id. at 259 (emphasis added).

15. The district court concluded that only black females "should be in the class of individuals

(footnote continued)

the class to include black males, the district judge, in his Order of December 8, 1976, reiterated the class definition given in his pretrial order, without, however, providing any new explanation for this decision.[16] In view of the district court's finding that black males had indeed been the victims of unlawful racial discrimination, the December 8, 1976 decision was completely unjustified and should be reversed.

The district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that

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who are entitled to participate in the back pay award and other related relief to be afforded members of the class," in spite of his findings that defendants' hiring and promotion policies discriminated against all blacks, including black men.

16. The district court explained that its post-trial ruling was based on "the reasons advanced at former hearings on the issue [of class certification]." The reason given at the pretrial hearing was that a potential conflict in the relief sought by black women and black men would render the former's representation of the latter inadequate.

there existed a potential conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiff's ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

Based on the district court's own findings following the trial on the merits, its post-trial order excluding black males from the plaintiff class compels reversal.

III. THE TRIAL COURT ERRED IN FAILING TO NOTIFY ABSENT CLASS MEMBERS THAT THEY WOULD BE EXCLUDED FROM THE ACTION

The district court believed that in this case black women could not adequately represent the interests of black men. Only one of the three original black plaintiffs was male, a Mr. James Williams. Thus, Mr. Williams was, in the eyes of the trial court, the sole representative of the absent black male class members.

In May 1973, Mr. Williams chose to withdraw from the lawsuit, citing his "religious views." As far as the trial court was concerned, without Mr. Williams there was no one to represent the interests of absent black male members of the plaintiff class. Therefore, when Mr. Williams voluntarily chose to withdraw his racial discrimination claim, the absent male class members were left without a representative and were, upon the defendant's motion, excluded from the lawsuit.

Once the district court had made it clear that it considered Mr. Williams to have been the sole adequate representative of the black male class members, plaintiffs' counsel requested that the absent class members be informed of the fact that their sole representative had decided to drop his claim. However, the trial court refused to allow the requested notice.[17] I believe that this was error and that the district court should have allowed notice for the absent male class members, informing them that their representative had decided to drop his (and their) action.

F.R.Civ.P. 23(e) provides that "... a class action shall not be dismissed or

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17. Plaintiff's counsel: Would your Honor be agreeable to sending of a notice to black males ... saying that they have been provisionally excluded from the class involved in this case and if they wish to come forward and represent and have their claims determined in this case also that one of them needs to step forward?
The Court: No. I don't think so. I am not going to go into that.

compromised without the approval of the Court, and notice of the proposed dismissal shall be given to all members of the class..." (emphasis added). One "purpose of [Rule 23(e)] is to protect the nonparty members of the class ... when the representatives become fainthearted before the action is adjudicated." Wright and Miller, Federal Practice and Procedure § 1797. I believe that there is no question but that the mandatory notice requirement of Rule 23(e) was triggered in this case and that the trial court erred in failing to provide notice to the soon-to-be-excluded absentee class members.

Once a plaintiff class has been certified, the provisions of Rule 23(e) become applicable.[18] As the Majority correctly

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18. It has been held that notice to absent class members is mandatory even when the class representative chooses to drop the action prior to class certification. See, e.g., Rotzenburg v. Neenah Joint School District, supra; Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D.Ill. 1970); Philadelphia Electric Company v. Anaconda Am. Brass Co., (footnote continued)

notes, ante, slip op. at 1995 at ____, the notice requirement set forth in Rule 23(e) is mandatory. Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686 (N.D.Ga. 1975); Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D.Wis.1975); Rotzenburg v. Neenah Joint School District, 64 F.R.D. 181 (E.D.Wis. 1974); Muntz v. Ohio Screw Products, 61 F.R.D. 396 (N.D.Ohio 1973); Washington v. Wyman, 54 F.R.D. 266 (S.D.N.Y. 1971).

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42 F.R.D. 324, 326 (E.D.Pa. 1967). However, there is some counter authority. See, e.g., Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978); Roper v. Consurve, 578 F.2d 1106 (5th Cir. 1978); Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975). Cf. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981) (Rule 23(e) is inapplicable prior to certification of the plaintiff class, however the Due Process Clause of the Fifth Amendment mandates notice to putative class members). It is therefore important to note that from November 17, 1972, until December 20, 1974, black males were indeed members of the certified plaintiff class. There may be some question as to whether Rule 23(e) applies when a representative chooses to withdraw prior to certification but "... of course, after certification Rule 23(e) clearly governs ..." Developments in the Law—Class Actions, 89 Harv.L.Rev. 1318, 1542 n.32 (1976).

However, the Majority has asserted that Mr. Williams' withdrawal as class representative and the resultant exclusion of black males from the plaintiff class did not constitute a "dismissal" within the meaning of Rule 23(e). Ante, slip op. at 1995, n.14, at _____, n.14. Thus, the Majority concludes that Mr. Williams' departure and the exclusion of black males did not trigger the mandatory notice requirement.[19] I must take

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19. In their footnote 14, the Majority seems to suggest that insofar as the plaintiff-appellants have failed to specifically cite Rule 23(e) in their argument regarding the trial court's refusal to provide notice, the issue need not be seriously considered by this Court. This reasoning defeats the very purpose of Rule 23. Rule 23(e) is designed to protect absent class members from being sold out or abandoned by their own class representatives. See generally, 3B Moore's Federal Practice, ¶ 23.80 et seq.; 7A Wright and Miller, Federal Practice and Procedure § 1797. It would turn the rule on its head to hold that Rule 23(e) will only be enforced if the class representative invokes it. In a case involving a "sell out" or abandonment of absent class members by the class representative, we could hardly expect the class representative to invoke Rule 23(e). That is why the mandatory notice requirements of Rule 23(e) can and must be raised by the court sua sponte.

exception to this conclusion. When Mr. Williams withdrew from the action, his departure was arranged through the use of F.R.Civ.P. 21 (motion to drop a party). However, it is clear that "... the parties [should] not be allowed to circumvent [Rule 23(e)] simply by classifying a dismissal as a motion to drop one or more parties under Rule 21; the court is obliged to determine if the change in parties will affect the rights of the other class members so that notice of the motion should be given." Wright & Miller, 7A Federal Practice and Procedure § 1797.[20]

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20. For the purpose of Rule 23(e), dropping a party pursuant to Rule 21 is the functional equivalent of a voluntary dismissal if its effect will be to deny absent class members relief. Philadelphia Electric Company v. Anaconda Am. Brass Co., supra. Compare Zeffiro v. First Pennsylvania Banking & Trust Co., 82 F.R.D. 31 (E.D.Pa. 1979) (where only one of three named defendants chooses to withdraw, and the two remaining plaintiffs are adequate representatives of absent class members' interests, Rule 23(e) notice is not required). Similarly, dropping a class action claim pursuant to Rule 15(a) will trigger the Rule 23(e) notice requirement, McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977), vac. on other grounds, 569 F.2d 276

(footnote continued)

Rule 23(e) is designed to serve at least two important purposes. First, it protects absent class members who may be relying upon the pendency of a class action from being prejudiced if their named representative should choose to drop his (and their) action. Second, the Rule is a prophylactic device, a safeguard designed to discourage collusion.[21] Without Rule 23(e) class action defendants might seek to "buy off" class representatives in an effort to "turn off" a class action.[22]

(5th Cir. 1978). Moreover, when the scope of a proposed plaintiff class is to be narrowed, and many of those once in the class are to be excluded, Rule 23 notice is required. Ross v. Warner, 80 F.R.D. 85 (S.D.N.Y. 1978); Turoff v. Union Oil Co. of California, 61 F.R.D. 51 (N.D. Ohio 1973).

21. The rule is in part intended to prevent collusion, however it is not necessary to demonstrate collusion in order to trigger the notification requirement. 23(e) is a per se rule which requires notice to absent class members whenever the representative plaintiff chooses to voluntarily withdraw his action and the effect will be to prejudice the class members he represents.

22. The mandatory notice requirement is intended to prevent representative plaintiffs from

(footnote continued)

Without in any way questioning the piety or sincerity of the named plaintiff who chose to withdraw from this case, we must recognize that his fortuitous departure from the lawsuit did result in the exclusion of all black males from the plaintiff class---a valuable boon to defendants. Thus, one can readily see the grave potential for abuse which will follow from the Majority's holding that Rule 23(e) notice is not required in a case such as this. Under the rule set forth by the Majority, future class action defendants may be tempted to quietly secure the withdrawal of the named class representative and thereby "turn off" the class action. If, as the Majority holds, Rule 23(e) can be ignored, there will be nothing to prevent such collusion.

Although the Majority holds that Rule 23(e) is inapplicable in this case, ante at

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"selling out" their fellow class members. Burks v. Lasker, 441 U.S. 471, 99 S.Ct. 1831, 1841, n16, 60 L.Ed.2d 404 (1979).

19, n.14, the Majority does indicate that if the absent class members were aware "of their initial inclusion in the plaintiff class, had relied on the class suit to protect their rights, and would be prejudiced as a practical matter by exclusion from the class," notice would indeed be mandatory. Ante slip op. at 1996, at_____. However, the Majority concludes that because "there is no showing that black males relied to their detriment" on their provisional inclusion in the class, notice of their exclusion was not required. Ante slip op. at 1996, at_____.

As the Majority suggests, there is some authority for the proposition that 23(e) notice need not be provided if the trial court determines that the absent class members have not detrimentally relied upon their inclusion in the class. See, e.g., Roper v. Consurve, 578 F.2d 1106 (5th Cir. 1978); Wallican v. Waterloo, 80 F.R.D. 492 (N.D. Iowa 1978); Berse v. Berman, 60 F.R.D. 414

(S.D.N.Y. 1973); Elias v. National Car Rental, 59 F.R.D. 276 (D.Minn. 1973). But see, e.g., Rotzenburg v. Neenah Joint School District, 64 F.R.D. 181 (E.D.Wis. 1974); Muntz v. Ohio Screw Products, 61 F.R.D. 396 (N.D.Ohio 1973). However, in those cases where district courts have seen fit to dispense with the 23(e) notice requirement, they have done so only after making a specific finding of fact concerning the question of whether absent class members may have detrimentally relied upon their inclusion in the plaintiff class. In each of these cases, the district court recognized its affirmative duty to safeguard the interests of absent class members. If the court determined that absent class members may have detrimentally relied upon inclusion in the plaintiff class, notice was ordered. See e.g., Rotzenburg v. Neenah Joint School District, supra; Ross v. Warner, 80 F.R.D. 88 (S.D.N.Y. 1978); Muntz v. Ohio Screw Products, 61 F.R.D. 396

(N.D.Ohio 1973). Only if the court specifically found that absent class members could not have detrimentally relied was the Rule 23(e) notice dispensed with. See, e.g., Elias v. National Car Rental Systems, Inc., 59 F.R.D. 276 (D.Minn. 1973); Wallican v. Waterloo, 80 F.R.D. 492 (N.D.Iowa 1978).

In the instant case, however, the district court completely ignored its responsibilities under Rule 23(e). The trial court summarily rejected the request that the black male class members be notified, see note 17, supra, making no inquiry or determination as to whether the soon-to-be-excluded class members may have detrimentally relied upon their initial inclusion in the plaintiff class. I believe that this was error. If a plaintiff representative voluntarily takes action which will result in absent class members being denied relief, Rule 23(e) requires that the absent class members be notified. Although there is some authority

for the proposition that such notice is unnecessary if it is determined that absent class members have not detrimentally relied upon their initial inclusion in the plaintiff class, notice can be dispensed with only if the trial court determines that as a factual matter absent class members did not detrimentally rely upon their initial inclusion. In this case, no such finding was ever made.

The Majority seems to suggest that because black male class members were never formally notified of their inclusion in the plaintiff class, they therefore could not have relied upon the pendency of the class action. However, in many reported cases, district courts have ordered 23(e) notice to absent class members even though the absentees never received formal written notice of their initial inclusion in the plaintiff class. See, e.g., Rotzenburg v. Neenah Joint School District, supra. Washington v. Wyman, supra; Muntz v. Ohio Screw Products,

supra; Ross v. Warner, supra. Although the absent class members in this case may never have received formal written notice of their inclusion in the plaintiff class, we cannot just assume that they were unaware of the existence of this action. The record indicates that Travenol Laboratories was the major employer in a small Mississippi town. Thus, many of the absent class members might well have learned of the pendency of this suit by word of mouth.

In this case, Rule 23(e) notice was required because "[c]lass members ... may have relied upon informal publicity about the existence of the class suit and abstained from filing individual or class claims.... If a class member learned that a suit had been filed, but not that it had been terminated, he might lose his claim." Developments, supra at 1541. Thus, I believe that,

> "[M]any of the ... abandoned ... class members may have received actual notice of the suit ... through publicity ... and were perhaps deterred from instituting their own suits in reliance on their membership. Equity dictates that these possible litigants not forfeit their rights for lack of knowledge that they [were] once again on their own.

Ross v. Warner, supra at 91.

The Majority has also noted that because there had been "no showing" of detrimental reliance on the part of absentees, 23(e) notice was not required. Ante slip op. at 1996, at_____. The Majority seems to suggest it was the plaintiff's burden to establish that absent class members had detrimentally relied upon their initial inclusion in the plaintiff class. Of course, this cannot be the rule. Rule 23(e) is designed to protect absent class members from collusion or abandonment by their own representatives. Certainly the representative parties cannot be relied upon to establish that 23(e) notice is required.

Rather, it is the trial court's affirmative duty as monitor and guardian for the interests of absent class members to determine whether Rule 23(e) notice is necessary.

Whenever a representative plaintiff voluntarily chooses to take action which will result in the denial of relief to absent class members, Rule 23(e) notice is required:

> "By asserting a representative role on behalf of the alleged class, [the named plaintiff] voluntarily accepted a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement ... if prejudice to the members of the class they claimed to represent would result..."

Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978).

> "... having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender."

Rothman v. Gould, 52 F.R.D. 494, 496

(S.D.N.Y. 1971).

As Judge Clark, a member of this Majority, noted in an earlier case,

> "dismissal or compromise of the class suit may be detrimental to those persons who relied upon the class suit as the primary means of vindicating their legal claims ... Dismissal of the class suit without notice may result in absentee class members' losing their claims entirely if they subsequently fail to file individual claims."

McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977) vac. on other grounds. 569 F.2d 276 (5th Cir. 1978).[23]

If, as the Majority contends, black women could not adequately represent the interests of black men, then Mr. Williams was the sole representative of the black male members of the plaintiff class. As we know, Mr. Williams chose to withdraw from this action. Once the district court determined

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23. Although McArthur v. Southern Airways, Inc., supra, is no longer binding precedent in this Circuit, we may of course consider its sound reasoning and analysis.

that Williams' departure would result in the exclusion of all black males from the plaintiff class, the court was duty bound to inform the absent class members of the fact that their sole representative had dropped his (and their) claims. In refusing to allow such notice, the district court clearly failed in its role as guardian of the interests of the absent class members. This was not a matter of discretion. Rule 23(e) required that notice be sent.

IV. PARTING ADMONITIONS

It has not been my intent, in setting forth my reasons for this dissent, to attempt an exhaustive analysis of Title VII law. I wish merely to sound a note of alarm at the result reached by the Majority as to black males' exclusion from the class. There is enough in the district court's findings to indicate that black males have been discriminated against in violation of Title VII. Accordingly, black men are entitled to such

relief as will give them their just and equitable place in the industrial orbit of Travenol's Cleveland, Mississippi plant. Certainly, they should not have been excommunicated from this lawsuit without notice and left to languish in industrial purgatory.

As a result of the Majority's commendable reasoning in regard to other aspects of class certification, this case must now be remanded to allow the inclusion of new members in the plaintiff class. See ante, Section IIC. Thus, there is no reason to suppose that adding black males to the plaintiff class will involve any further trespass on the court's time and resources. Even if we were to find that a new trial is required in order to allow black men to prove their claims of racial discrimination, this fact would not justify denial of relief. It is true that in some cases, justice delayed is justice denied. But on these facts, another apothegm is appropriate: justice takes

precedence over the seconds on a clock. Considerations of time cannot be more important than the imperative to compensate victims of illegal conduct.

I, like my brethren, am mindful of the fact that this case comes to us nearly a decade old. See ante at 2. There is the danger that Payne v. Travenol Laboratories, Inc. will become another "judicial paleolithic museum piece." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168 (5th Cir. 1978).[24] Nevertheless, I believe my position in that earlier case is as valid today as it was then: we should "remain mindful that the Court must not diverge from the direction chartered for us by the Title VII compass, no matter how long and difficult the journey."[25]

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24. At the time Pettway was so labeled, it was before this Court for the fourth time in thirteen years.

25. Pettway v. American Cast Iron Pipe Co., supra.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIE MAE PAYNE et al.,

Plaintiffs-Appellees
and Cross-Appellants,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,

Defendants-Appellants
and Cross-Appellees.

No. 80-3764

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 22, 1982, 5 Cir. 1982,_____ F.2d_____) (July 6, 1982))

Before CLARK, Chief Judge, GOLDBERG and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit

Rule 16) the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ J.S. Williams
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Order

Pursuant to the Memorandum of Decision this day released in the above numbered and captioned action, it is

ORDERED:

1) That the motion of defendants to dismiss and/or for summary judgment shall be, and the same hereby is, in all respects overruled and denied;

2) That the motion of defendants for an order defining and limiting the class which plaintiffs may represent in the action sub judice shall be, and the same hereby is, denied and overruled;

3) That the motion of plaintiffs to certify this action as a proper class action pursuant to Rule 23(c)(1), F. R. Civ. P. shall be, and the same hereby is, sustained;

4) That the class to be represented by the plaintiffs herein shall be, and the same hereby is, initially defined as,

> All present, past and future black employees and all past and future black applicants for employment at the facility operated by defendants, or either of them, at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black employees of defendants and all black applicants for employment at said facility, prior to March 3, 1970 are excluded from the class.

5) That the portion of this order defining the class which may be represented by plaintiffs in this action is

conditional and the court reserves the right to alter or amend the same at any time and on as many occasions as the court may find proper before the decision on the merits, and to create such subclasses as the evidence received, or to be received, in this action may require.

This, the 16th day of November, 1972.

/s/ ORMA R. SMITH

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Order

The matters determined herein having been fully briefed and orally agued by the parties and the Court being fully advised in the premises, it is hereby

ORDERED:

1) That the motion of plaintiffs and plaintiff-intervenors to amend the time limitations in the initial definition of the racial class filed September 20, 1973 shall be, and the same hereby is, denied and overruled;

2) That the motion of plaintiffs and plaintiff-intervenors to define the sex class filed November 12, 1974 shall be, and the same hereby is, denied and overruled;

3) That the motion of defendants to redefine the class filed November 1, 1974 shall be, and the same hereby is, granted and sustained;

4) That the class to be represented by plaintiffs and plaintiff-intervenors herein shall be, and the same hereby is, defined as,

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants

who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

5) That the portion of this Order defining the class which may be represented by plaintiffs and plaintiff-intervenors in this action is conditional and the Court reserves the right to alter or amend the same at any time and on as many occasions as the Court may find proper before the decision on the merits, and to create such subclasses as the evidence received, or to be received, in this action may require.

6) That the plaintiffs and plaintiff-intervenors give the best notice practicable of this Order to each person whom they claim to be within the definition of the class as set forth in Paragraph 4 of this Order. Said notice shall be given by first class mail, postage prepaid, no later than January 1, 1975, to each such person whose name and address is known to plaintiffs and plaintiff-intervenors or to their counsel, or whose identity can be ascertained with reasonable effort through the inspection of defendants' files. Notice to such persons whose names and addresses are unknown to plaintiffs and plaintiff-intervenors or to their counsel and whose identities cannot be ascertained by reasonable effort, shall be given by publication of notice three (3) times in three (3) consecutive weeks in The Bolivar Commercial News, the first publication to be made no later than January 1, 1975. Both individual and public notice shall be in the forms which are attached to this Order as Exhibits A and B and which are hereby approved by the Court.

7) On or before March 1, 1975, counsel for plaintiffs and plaintiff-intervenors, after consultation with counsel for defendants and after obtaining any necessary informa-

tion from the Clerk of this Court, shall prepare and submit to this Court a list of all persons who have indicated their wish not to participate in this action by so responding to the notice described in Paragraph 6 of this Order and a list of all other persons to whom said notice was sent; said counsel shall also submit to this Court proof of publication of notice as set forth above.

ORDERED. This 20th day of December, 1974.

/s/ ORMA R. SMITH

United States District Judge

Approved as to form:

/s/ RICHARD T. SEYMOUR
Counsel for plaintiffs and plaintiff-intervenors

/s/ ROBERT S. LASKY
Counsel for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

(Caption Omitted in Printing)

Memorandum of Decision

Following a two-week bench trial, this employment discrimination action is now before the court for decision on the merits.

The suit was commenced March 2, 1972, by the filing of complaint by three individual plaintiffs seeking to represent a class of persons allegedly subjected to racial discrimination at the hands of the defendants. The scope of the plaintiff class was subsequently broadened by the addition of allegations of sex discrimination. Of the original named plaintiffs, one was a black, male employee at defendants' Cleveland, Mississippi, facility and two were black, female applicants for employment at the defendant's Cleveland plant.

Defendants in the case are Travenol Laboratories, Inc., and Baxter Laboratories, Inc. Because Travenol is a wholly-owned subsidiary of Baxter, the court will make no attempt to differentiate between the defendants and will refer to them indiscriminately as "Travenol", "Baxter", or simply "the defendants".

The course to trial and determination on the merits was long and arduous. During the months following the filing of complaint, the court was required to rule upon a motion to strike jury demand (which was granted), a motion to certify as a class action (which was granted), a motion to dismiss and/or for summary judgment (which was denied), a motion for a preliminary injunction (which was denied) and various other motions concerning discovery and the substitution of parties. On or about November 15, 1973, counsel approached the court and requested pro-

ceedings in the case be held in abeyance pending the outcome of settlement negotiations. Negotiations dragged on until June of 1974, at which time they collapsed.

During the summer of 1974, the parties resumed vigorous discovery. The court bifurcated the trial of the case, deferring consideration of the appropriate relief to be afforded plaintiffs, if any, until after the court had determined if defendants' conduct about which plaintiffs complained is or was in contravention of Title VII of the Civil Rights Act of 1964.[1] The liability portion of the trial began March 3, 1975, and concluded March 14, 1975. However, the end of the trial unfortunately did not mark the end of the litigation of the matter of liability. Voluminous and time-consuming post-trial motions filed on behalf of both plaintiffs and defendants required disposition by the court prior to consideration of the merits.

In the course of the three-year period between filing of complaint and commencement of trial, the cast of the named plaintiffs changed substantially. Two of the original named plaintiffs, James Williams and Alma Jean Williams, sought and received permission of the court to withdraw as parties. Willie Mae Payne remains the only original named plaintiff in the lawsuit. In 1973, the court sustained a motion for leave to intervene filed on behalf of Delilah Cherry and Birdie Griffin. Thereafter, the case proceeded to trial with Ms. Payne, Ms. Cherry, Ms. Griffin, and the class which they represent opposing the defendants, Travenol and Baxter.

Although she has since moved to Chicago, Illinois, Willie Mae Payne was, at the times pertinent to the issues now before the court for determination, a black female resident of the Cleveland, Mississippi area in which the defendants' facility is located. There was some controversy

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[1] 42 U.S.C. § 2000(e) *et seq.*

as to when Ms. Payne initially applied for employment at the Baxter plant; however, the parties have stipulated that she did so at least as early as March 17, 1970. Although Ms. Payne has no more than seven years of formal schooling, she obtained a tenth grade rating on the General Educational Development (GED) test on January 19, 1970. Ms. Payne was never hired by the defendants.

Delilah Cherry is a black female resident of the Cleveland, Mississippi area. At the time Ms. Cherry claims she was subjected to discrimination at the hands of the defendants, she had completed only eight years of formal education and had obtained a certificate of tenth grade equivalency on a GED test in 1967. Although she initially sought employment at the Baxter plant at least as early as 1970,[2] Ms. Cherry had no success in obtaining a job with the defendants until some time after the institution of the instant litigation. She is presently employed by the defendants.

There was a degree of confusion as to the facts surrounding the claim of plaintiff Birdie Lee Griffin. Prior to trial, counsel stipulated as to certain facts concerning Ms. Griffin. When Ms. Griffin testified at the trial, it developed from her testimony that the Birdie Lee Griffin who was the subject of the stipulations was the daughter and namesake of the Birdie Lee Griffin who was a witness

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[2] As will be discussed in greater detail *infra*, until November 5, 1971, the personnel department at Travenol would consider job applications only from persons who were referred to them from the local office of the state employment service. The attempts of Ms. Cherry and Ms. Payne to secure employment at Travenol were initially thwarted by the refusal of the employment service to refer plaintiffs to defendants. Ms. Payne and Ms. Griffin went to the state employment office initially to seek employment at Travenol. Ms. Cherry went directly to Travenol in the first instance but was instructed that defendants hired only employment service referrals. The plaintiffs were ultimately referred to Travenol, but only Ms. Cherry was successful in obtaining employment.

and party in this cause. Accordingly, the facts set forth in the stipulations as to Ms. Griffin have no application to this lawsuit.

The correct facts, as the court finds them to be from her testimony at trial, are that Birdie Lee Griffin is a forty-eight year old black woman currently residing in the Cleveland, Mississippi area. Ms. Griffin completed eleven years of formal education and has attained a twelfth-grade equivalency on the GED. Ms. Griffin first applied for a job with Travenol in 1966. Although she was referred to Baxter by Mississippi State Employment Service (MSES), Ms. Griffin was never offered a job at the Cleveland plant.

Each of the named plaintiffs filed discrimination charges with the Equal Employment Opportunity Commission (EEOC). Ms. Payne lodged two charges, one each in February and March of 1970. Named as respondents in these charges were Baxter Laboratories and MSES. These charges related primarily to Travenol's education requirement, the use of MSES as an exclusive source of applicants, and claims of racial discrimination. The EEOC investigated Ms. Payne's allegations and, on March 15, 1971, issued findings of fact to the effect that reasonable cause existed to believe that Baxter's practices resulted in discrimination against blacks substantially as alleged by Ms. Payne. A right to sue letter was issued Ms. Payne on December 28, 1971, as to MSES, and on September 6, 1972, as to Baxter.

Ms. Cherry also filed two charges with the EEOC naming Baxter and MSES as respondents. The first charge, lodged August 14, 1970, inferred that white job applicants at the Travenol plant were preferred to black. The second charge, signed by Ms. Cherry on January 12, 1971, contained only the simple allegation that Travenol refused to hire Ms. Cherry because she is black. The EEOC investigation conducted in response to Ms. Cherry's charges re-

sulted in a finding that reasonable cause existed to believe Travenol was then engaged in unlawful employment practices. This finding was based almost entirely upon Travenol's requirement that each job applicant possess at least a tenth grade education or an equivalent score on the GED test. A right to sue letter was issued to the attorney for Ms. Cherry by EEOC on June 6, 1973.

Ms. Griffin filed two charges against Baxter with the EEOC. The first was received by the Commission on August 28, 1970, and the second was executed by Ms. Griffin on January 12, 1971. Both of Ms. Griffin's charges related to racial discrimination. She received a right to sue letter, through her attorney, from EEOC on June 6, 1973.

In their complaint, plaintiffs sought injunctive relief and damages in the nature of back-pay to remedy what they allege is defendants' past, present, and future discrimination against blacks and women. Plaintiffs maintain that the defendants' use of the tenth grade education requirement violates Title VII insomuch as the requirement has a distinctly disparate effect on blacks in the Cleveland, Mississippi area and cannot be justified as a business necessity. Plaintiffs also attack what they claim was defendants' practice of restricting the better-paying jobs to male employees. In conjunction with this allegation, plaintiffs maintain that the preservation of separate seniority rosters in the two classifications of defendants' production-line workers[1] discourages inter-job transfers and perpetuates the effects of past discrimination. Plaintiffs also included in the complaint a charge that the manner in which Travenol management hires and promotes its clerical and professional staff unlawfully discriminates against blacks.

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[1] As will be discussed in greater detail *infra*, Travenol groups its production line workers into "assemblers" and "material handlers". The proof in the case shows that material handlers are substantially better paid than assemblers.

As was indicated earlier, the court certified this action as one which may be maintained on behalf of a plaintiff class as required in Fed. R. Civ. P. 23(c) and tentatively defined the class as follows:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

Although perhaps not strictly necessary, the court deemed it desirable that, pursuant to Fed. R. Civ. P. 23 (c)(2), notice be furnished members of the above-defined class. The notice was through the mail to those whose identities were known to plaintiffs' counsel, and through publication to those unknown to counsel. It appears that approximately 1300 class members received notice of the pendency of the action through the mailing. Because some of the responses to the notice evince as apparent misunderstanding as to the basic nature of the matter, both plaintiffs and defendants moved the court to require some additional or supplemental notice to prospective class members. Defendants sought to have the court modify the class notice from the "opt-out" to the "opt-in" form. Plaintiffs requested a "clarifying notice" be sent to each of the approximately 400 members of the plaintiff class who had responded to the court's original notice by seeking exclu-

sion from the class. The court determined to follow neither course proposed by counsel but, instead, entered an order deferring consideration of the advisability of requiring an additional class notice until such times as the question of the defendants' liability has been resolved.

RACE DISCRIMINATION

Baxter's involvement in Mississippi began in 1950, when, pursuant to a legislative program of the State of Mississippi designed to encourage the immigration of industries into the state (Balance Agriculture With Industry—BAWI), the defendants established a facility in Cleveland, Mississippi. Construction and periodic expansion of the Cleveland plant was financed in part through bonds issued by the City of Cleveland under the BAWI program. Approval by the city voters was a prerequisite to participation in the BAWI program. A good relationship between Travenol management and employees and the political, economic, and social leaders of the community was therefore essential to the successful operation of the Travenol plant in Cleveland.

From the commencement of operations in 1950, the defendants' Cleveland plant has manufactured, processed, packaged, and distributed drug and pharmaceutical products, with an emphasis on parenteral fluids and intravenous solutions. These products are used by hospital and medical facilities throughout the Mid-South.

Travenol's products are packaged and labelled on an assembly line along which the bottles are filled with various solutions. Production line workers are referred to as "assemblers". Assembler positions by and large involve the filling, capping, labelling, and inspection of bottles as they move along the production line. A second type of production line worker is known as a "material handler". The material handler job consists primarily of coordinating the flow of materials along the assembly line and the distribu-

tion of materials to various work stations along the line in accordance with production schedules.

Of the approximately 1200 persons employed at the Travenol plant in Cleveland, some 900 occupy either assembler or material handler positions.

The employment practices attacked in the complaint have evolved since defendants' Cleveland facility began operation in July of 1950. From 1950 until 1966, Mr. Olin Taylor was employed as personnel manager at the plant. During this period, he personally hired all custodians, material handlers, and assemblers. During his tenure as personnel manager, Mr. Taylor received no written instructions from Baxter management as to the standards which he was to employ in deciding which applicants to hire. His decisions were based mainly upon subjective factors and community references or recommendations played an important role in the hiring process. The most frequent source of references and recommendations was the industrial development committee of the Cleveland Chamber of Commerce. There were no blacks on this committee during the periods when it made references or recommendations. References were given heavy emphasis until the late 1950's or early 1960's, at which time their importance began to decline.

When Mr. Taylor began to rely less upon community references and recommendations in the late 1950's or early 1960's, he concurrently began to rely more heavily upon his own subjective judgment in determining whether to accept an applicant for employment. One of these subjective factors was Mr. Taylor's belief that close relatives of an employee with a good record would likely be good employees and, conversely, close relatives of an employee with a poor work record would likely be poor employees.

Prior to 1964, the defendant's work force was composed entirely of whites except for custodial or janitorial jobs.

This exclusion of blacks from noncustodial jobs was based in part upon conformity to local racial traditions.

At some point during 1964, and subsequent to the passage of Title VII, Mr. Taylor requested the Cleveland office of MSES to perform a survey of the noncustodial jobs at the Travenol plant and to recommend changes or alterations to the hiring process which would bring blacks into noncustodial positions and jobs as operatives on the production line. Following their study, MSES recommended that the defendants impose a requirement that prospective applicants possess at least a twelfth grade education. Mr. Taylor rejected this recommendation as too restrictive and, instead, Travenol adopted a tenth grade standard for prospective employees. A tenth grade GED equivalency would also satisfy this requirement.

At the time of the imposition of the tenth grade requirement, February of 1965, Travenol employed four blacks as material handlers. Each had been promoted from a custodial position to a position on the production line. The defendants had not, prior to 1965, initially hired any blacks as operatives.

In February 1965, Mr. Taylor determined to use MSES as the exclusive referral source for applicants for assembler and material handler positions at the Travenol plant. Prospective employees directly contacting the personnel office at the plant were instructed to report to the MSES office to initiate the application process, inasmuch as the personnel department would not consider an applicant not referred by the Cleveland office of MSES.

Prospective employees satisfying the MSES standards, including the tenth grade requirement, were referred to the Travenol plant for an interview with Mr. Taylor. The impression which Taylor gained at this interview, coupled with the recommendation of plant employees, determined the applicant's success or failure in landing a job with

Travenol. Between 1965 and 1971, the defendants customarily contacted one of their black employees, Julius Lucas, to ascertain his opinion of prospective black employees.

In 1967, Mr. Taylor was succeeded as personnel manager by James K. Lesley. Mr. Taylor supplied Mr. Lesley with the names of persons in the local community who could serve as references for job applicants. Lesley's tenure with Travenol was brief, terminating in April 1968. Mr. Lesley was succeeded as personnel manager by James E. Self on July 15, 1968. Mr. Taylor, who was still in defendant's employ, did not give Mr. Self instructions as to how to conduct interviews with applicants since he considered Mr. Self's background in personnel matters sufficient for performance of the duties of personnel manager at the plant. Mr. Self served as personnel manager at the Cleveland plant from July 15, 1968 to August 31, 1974.

During Mr. Self's tenure, hiring decisions as to persons referred by MSES were based primarily on subjective factors. The qualifications considered included personal cleanliness, general alertness, and comprehension. The personnel manager did not have one set of interview questions which he used in each and every interview, the questions asked varied among the applicants.

Although Travenol abandoned its policy requiring that all applicants for jobs as operatives be referred by MSES in the Fall of 1971,* it has continued in effect the tenth grade education requirement for operatives on the production line.

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* In response to information received by defendants' attorneys to the effect that a lawsuit would soon be initiated charging that MSES's Cleveland office referred job applicants in a racially discriminatory manner, defendants notified MSES on November 5, 1971, that Travenol would no longer utilize the services of MSES.

The greater portion of the evidence offered at the trial, including expert testimony, tables, and statistical displays, was addressed to the issue of the effect of the tenth grade education requirement. Statistics of all kind and expert analysis of statistical evidence ad infinitium were received into evidence. The voluminous nature of the documentary evidence thus introduced, as well as counsels' heated debate as to the proper interpretation of each item in evidence tended to confuse rather than enlighten. To engage in an extensive discussion of the evidence in this regard would result in an opinion beyond all reasonable bounds. Accordingly, the court's discussion of the issue will be brief and to some extent conclusory.

RACIAL EFFECT OF TENTH GRADE EDUCATION REQUIREMENT

Lamentations aside, it falls to the court to determine, in reverse order, whether the defendants' educational requirement has been "shown to be significantly related to successful job performance" and whether the requirement "operate[s] to disqualify Negroes at a substantially higher rate than white applicants". Griggs v. Duke Power Co., 401 U.S. 424, 426, 28 L. Ed. 2d 158, 161, 91 S. Ct. 849 (1971).

Because there are no available U.S. Census Bureau figures showing the number of blacks and whites in Mississippi with ten or more years of education, the parties stipulated that the relative racial effect of the tenth grade requirement used by defendants is as great as the relative effect of a ninth grade requirement. Using the ninth grade figures, the 1970 census report for the State of Mississippi clearly shows the education requirement has a substantially disproportionate adverse effect upon blacks. In the county in which defendant's plant is located, for example, 81.6% of the black males in the county over 25 years of age had less than 9 years of education. Of the black females in the county over 25, 72.9% had fewer than

9 years of education. The comparable figures for whites were 29.6% for males and 20.8% for females.

Defendants' only attempt to blunt the effect of the Census Bureau figures was to speculate that the educational gap between blacks and whites would be considerably narrower if figures were available which included GED equivalencies in addition to formal education. No concrete proof was offered in support of this contention and the court is not inclined to believe, absent some showing, that blacks would avail themselves of the GED program to a greater extent than whites in numbers so large as to significantly reduce the great disparity apparent in the Census Bureau figures. Considering all the evidence, the court has concluded that plaintiffs have shown in a most convincing manner that Travenol's tenth grade or equivalency requirement disqualifies substantially more black applicants than white.

As might be expected, the majority of proof introduced by defendants was in support of their assertion that the nature of the product manufactured by them at their Cleveland plant dictates a literate and alert work force, a condition which can be assured only through use of a screening process which includes the tenth grade education requirement. Simply stated, defendants claim the requirement is a business necessity. In the opinion of the court, the proof in the case shows otherwise.

Assemblers and material handlers work from place to place on the production line and must be familiar with each job involved. They are required, at times, to keep records and to add, subtract, and multiply. They must be alert, attentive, flexible and must be able to read, with an understanding of what they have read, and to follow instructions. Generally, material handlers and assemblers learn their respective duties from on-the-job training. The parties stipulated that the operative positions do not re-

quire any particular sort of previous employment on the part of the incumbent.

It is defendants' position that the high speed of the production line on which the bottles are filled with the intravenous solutions requires a particular alertness and attentiveness on the part of the employee assigned to line operations. Decisions affecting quality must be made quickly as the production line progresses. Accordingly, defendants maintain that operatives must possess sound judgment in order to appreciate the potential consequences of their actions.

Because of the nature of their product and its intimate effect on human life, Travenol management has made every attempt to build quality control consciousness into each job at the plant. The potentiality for disaster inherent in a mislabelled product in the drug industry dictates use of the tenth grade requirement as a necessary and effective screening device for the selection of competent employees, so defendants argue. Turning again to *Griggs*, the court finds the following language from that opinion highly instructive on this point:

> "Nothing in [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." 401 U.S. at 436, 28 L. Ed. 2d at 167.

After a full consideration of all of the evidence on the issue, the court is of the opinion, and so holds, that Travenol's tenth grade educational requirement does not measure the person for the operative job at its Cleveland plant.

Every condition of liability set forth by the Court in *Griggs* is to be found in this case. That is, the operative jobs at defendants' plant were reserved exclusively for and occupied exclusively by whites prior to passage of Title VII. The education requirement without question has a substantially more adverse effect upon black applicants than upon white applicants. And, from a familiarity with the nature of the operative jobs at the Travenol plant acquired through two weeks of hearings on the matter, the court is convinced the educational requirement has not been "shown to be *significantly* related to successful job performance." *Griggs, Supra,* 401 U.S. at 426, 28 L. Ed. 2d at 161 [emphasis added].

In concluding that the education requirement is not job related, the court considers it highly pertinent that the standard was not adopted until the defendants began desegregating their work force in order to comply with the Civil Rights Act of 1964. United States v. Georgia Power Co., 474 F. 2d 906, 912 (5th Cir. 1973).[3] Although the Cleveland plant had operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process, in 1965 Travenol de-

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[3] Although not cited as frequently in this opinion, the *Georgia Power* opinion was actually of more benefit to the court in determining the merits in this case than was the *Griggs* opinion. First, the defendants in *Georgia Power* actually presented a business necessity defense, something which was merely contemplated by the Court in *Griggs*. Second, the *Georgia Power* opinion dealt specifically with a minimum education requirement, 474 F. 2d at 918-19, whereas *Griggs* dealt principally with a requirement of a minimum score on an ability test.

termined to establish the tenth grade requirement for all noncustodial jobs, including the assembler and material handler positions which make up more than three quarters of Travenol's entire work force.

The court is also assisted in reaching a decision on the legality of defendants' education requirement by consideration of the EEOC's own guidelines concerning educational prerequisites for employment.* Application of the EEOC's interpretation of Title VII to the facts in the case at bar, as the court finds them to be, likewise compels a holding that the use of the tenth grade requirement constitutes unlawful discrimination against black applicants or prospective black applicants at defendants' Cleveland facility. 29 C.F.R. § 1607.1 *et seq.*

The court's holding is not to be interpreted as precluding defendants from adopting methods of testing or other measuring procedures to predict an applicant's ability to effectively perform the duties of an operative at defendants' plant. The court appreciates the fact that personnel assigned to these positions must be able to read with some degree of comprehension and be capable of performing certain mathematical calculations. However, where, as here, the crude benchmark selected by an employer to insure employees possess the ability to read and write and add and subtract operates to substantially and disproportionately burden minority applicants and has been shown to relate to job performance in only the most remote sense, use of that benchmark is proscribed by Title VII.

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* "The administrative interpretation of [Title VII] by the [EEOC] is entitled to great deference." *Griggs, supra*, 401 U.S. at 433-34, 28 L. Ed. 2d at 165.

THE OVERALL EFFECT OF DEFENDANTS' HIRING PRACTICES FOR OPERATIVE POSITIONS

The record reflects that once an applicant for an operative job at Travenol has hurdled the tenth grade barrier, the hiring decision is based primarily on subjective factors. These job decisions are made by defendants' personnel managers without written instructions or directives from corporate headquarters. Among applicants for these positions who met the requirement of referral by MSES while it was in effect, the defendant hired proportionately fewer blacks. Defendants' records reflect that for the period from April, 1971 through August, 1974, one of every three white applicants for operative positions at Travenol was hired, but only one of every six black applicants was hired. This disparate result reflects the combined effect of a tenth grade requirement and of the defendants' subjective discrimination.

The defendants' records indicate that in May, 1964, all operatives were of the white race. By March of 1966, more than a year after the implementation of the tenth grade education requirement and nearly two years after the passage of the Civil Rights Act of 1964, the defendants' operative force was still approximately 84% white. In February of 1969, the picture had not changed to any substantial degree and 82% of the male operatives were white while 89.8% of the female operatives were white. In March, 1970, during the period in which the EEOC charges which are pertinent to this case were lodged against defendants and at a time when the charges were under investigation by the EEOC, the company's records show that 76.6% of the male operatives were white and 82.8% of the female operatives were white.

The racial makeup of Travenol's operative force changed significantly between 1970 and 1973. By March of 1973, 54.1% of the male operatives were white and 70.1% of the female operatives were white. The court cannot ignore the

implication that the real incentive for the meaningful progress in intergration of the operative work force which the defendants achieved between 1970 and 1973 was furnished by the plaintiffs' charges with the EEOC and the subsequent institution of this lawsuit.

By February of 1974, 37.4% of the defendants' male operatives were white as were 57.5% of the female operatives. The 1970 Census Report indicates that in Bolivar County whites comprised 52.2% of the male population 18 years of age and older and 46.2% of the female.

While the above figures disclose a commendable degree of progress by the defendants, especially in the very recent past, in bringing blacks into the operative work force in numbers approaching the racial composition of the community, they also disclose significant underrepresentation of blacks in the operative work force during the early years in dispute in this case, 1970 and 1971.

Twelfth Grade Requirement

The defendants presently require a twelfth grade education for all office and clerical jobs, which include mail room duplicating clerk, telephone operator/receptionist, secretary, inventory clerk, accounting clerk, steno-clerk, and keypunch and data processing operator. The twelfth grade education requirement also applies to all technician jobs in the plant, including maintenance scheduler, molding technician, release coordinator, release coordinator (solutions), pharmaceutical chemical laboratory technician, chemical plant laboratory technician, standard technician in the industrial engineering department and molding specialist. Also subject to the twelfth grade requirement are apprentice mechanic jobs of all kinds, although the requirement does not apply to persons who have completed a course of training in a vocational-technical school, or to

persons with military experience in mechanical fields. All supervisory jobs, from group leader up, require a high school diploma, including the operative supervisors.

The defendants have not validated, in accordance with the EEOC or the Office of Federal Contract Compliance (OFCC) guidelines, the twelfth grade education requirement now in effect at their Cleveland plant.

Although there is a substantial turnover among office and clerical employees, these jobs have, since the opening of the plant, been held exclusively or disproportionately by whites. The precise date of the adoption of the twelfth grade requirement is unclear; however, it was adopted sometime subsequent to passage of the Civil Rights Act of 1964. Incumbent employees are not required to satisfy the education requirement as a condition of continued employment. It goes without saying that the beneficiaries of that policy were and are overwhelmingly white.

The court must, of course, approach the issue of whether defendants' high school diploma requirement contravenes Title VII in the same manner as the legality of the tenth grade requirement was approached.

The question of whether the diploma requirement operates to disqualify blacks in substantially greater numbers than whites is, as was the same inquiry regarding the tenth grade standard, easily resolved. In Bolivar County in 1970, this requirement disqualified 91.9% of black males over 25 and 88.9% of the black females over 25, but only 47.2% of white males and 41.9% of white females of this age. As with the tenth grade requirement, there is no evidence that such a large number of black persons possess twelfth grade equivalencies or GED diplomas, relative to whites possessing such credentials, so as to eliminate or reduce the disproportionately adverse impact of this requirement on blacks.

In response to an interrogatory propounded to them by plaintiffs, defendants outlined the duties of the office and clerical workers of whom a high school diploma is required. These positions include telephone operator/receptionist, key punch and data processing operator, secretary, and mail room and duplicating clerk. Upon close examination of these duties, it does not appear to the court that there is a tangible relationship between the duties of the great majority of defendants' office and clerical staff and any particular level of education. This is especially so regarding the duties of the telephone operator/receptionist and the mail room and duplicating clerk. Lack of a diploma would not conclusively demonstrate that an applicant failed to possess the qualifications necessary to efficiently fulfill the duties of office and clerical workers in defendants' employ, just as possession of a twelfth grade education would not of itself demonstrate that an applicant is qualified for one of these jobs.

Since the institution of the high school diploma standard, the defendants have not considered the use of any alternative to that particular requirement as a screening device. In view of the grossly disparate effect of the requirement on the black members of the labor pool in the Cleveland, Mississippi area the court cannot condone its continued use absent some effort by defendants to discover and employ some other effective standard with a more racially neutral impact.[1]

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[1] Although it appears that the education requirement was not completely to blame, defendants' office and clerical work force was overwhelmingly white as late as six months prior to trial. Between April 1, 1971 and August, 1974, seventy-eight whites and forty-one blacks applied for office or clerical jobs at the Cleveland plant. Ten of the one hundred nineteen applicants were ultimately hired. All ten were white. Between the opening of the defendants' plant in 1950 and August of 1974, no black was hired for an office or clerical job. Defendants have, since 1966, integrated their office and

Defendants also require a high school diploma of those employees who will be considered for promotion to supervisory positions and of those applicants for employment in technician jobs at defendants' plant. Regarding the technician job, defendants maintain that the education requirement is essential to ensure the persons hired for those positions possess the qualities necessary to successfully discharge the duties of the job. The qualities which defendants claim they seek in persons to be employed as technicians are alertness, judgment, comprehension, adaptability, responsibility and initiative. Defendants further argue that their supervisors must possess the same attributes as technicians plus a certain degree of leadership ability in order to effectively perform their duties.

Although there is no doubt that possession of the aforementioned attributes which defendants desire in the persons whom they employ as supervisors and technicians are important, if not absolutely necessary, qualifications, the court perceives no direct relationship between the possession of a high school diploma and the possession of any or all of these qualities. As with the tenth grade requirement, the defendants are simply employing too crude a standard in view of the all but undisputed adverse effect upon blacks.

College Degree Requirement

Defendants presently require an applicant for the job of scheduling analyst, traffic analyst, or systems analyst possess a college degree; however, the degree need not be in any particular discipline or major.

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clerical work force to some extent—less than ten percent is black—by transferring black persons employed in other capacities into office and clerical jobs. Defendants have hired some black applicants with clerical qualifications, but have assigned them to work as operatives on the production line.

Again, the 1970 Census Report for Mississippi demonstrates that this requirement has a substantial adverse impact on blacks. In Bolivar County in 1970, for example, 14.7% of the white males over 25 and 12.5% of the white females over 25 have college degrees, whereas only 3.2% of black males and 3.3% of black females of the same age have degrees. In Mississippi as a whole, 10% of the white persons in the state over 25 met this requirement while only 3.7% of the black people did.

The college degree requirements for traffic and systems analysts were not instituted until some time subsequent to July 15, 1968. The requirement has not been validated pursuant to EEOC guidelines.

Although no one is presently employed in the traffic and systems analyst jobs, defendants concede that no black has ever been employed in an analyst capacity at their Cleveland plant.

The defendants argue that the college degree requirement for the jobs in the analyst category is necessitated by the "professional demands" of the positions. In view of the disparate effect of the requirement and in the absence of more concrete evidence as to the need for the continued use of this qualification, the court has concluded that the college degree requirement for the jobs of scheduling, systems, and traffic analysts is unjustified and unlawful.

Failure to Post or Announce Vacancies in Jobs Above the Material Handler and Assembler Level

Although the defendants ordinarily announce to assemblers and material handlers the existence of a vacancy in other assembler or material handler positions so that employees may make known their interest in these positions, it is not customary to announce or post information concerning vacancies in office or clerical jobs, technician jobs,

or supervisory positions. Failure to post information concerning vacancies in the clerical, technician, and supervisory positions has resulted in the incumbents of those positions becoming the primary source of information concerning existing and/or expected vacancies. Since the supervisory, clerical, and technician work force, as well as the management, at Travenol's Mississippi facility has been and remains overwhelmingly white, the exposure to job vacancy information is much greater among white employees than among black. Travenol's failure to post notice to vacancies impedes the access of the company's black employees to the better paying and more desirable jobs.

Discrimination in Promotion

The most important criteria for promotion to jobs above the level of operative are an employee's length of service, possession of the requisite amount of education, and the opinion of the employee held by his or her supervisor and certain officials of the personnel department. Because of past and present hiring discrimination against blacks, reliance on length of service in making promotions has a disproportionately adverse impact upon blacks' prospects of promotion. The racial make-up of the defendants' noncustodial work force, exclusive of the operatives, is reflected in the following statistics:

	May, 1964		March, 1966		March, 1968	
Job Level	No.	% White	No.	% White	No.	% White
Officials and Managers	13	100 %	24	100 %	49	100 %
Professionals	0	...	18	100 %	20	100 %
Technicians	25	100 %	27	100 %	66	97.0%
Office and Clerical	24	100 %	23	95.7%	33	97.0%
Craftsmen	46	100 %	18	100 %	32	100 %

Job Level	Feb., 1969 No.	Feb., 1969 % White	March, 1970 No.	March, 1970 % White	March, 1971 No.	March, 1971 % White
Officials and Managers	52	100 %	52	100 %	48	100 %
Professionals	31	96.8%	40	97.5%	47	97.9%
Technicians	51	98.0%	14	100 %	12	100 %
Office and Clerical	29	96.6%	33	97.0%	35	94.3%
Craftsmen	34	100 %	68	98.5%	78	94.9%

Job Level	March, 1972 No.	March, 1972 % White	March, 1973 No.	March, 1973 % White	Feb., 1974 No.	Feb., 1974 % White
Officials and Managers	52	100 %	47	97.9%	53	96.2%
Professionals	52	94.2%	40	92.5%	43	88.4%
Technicians	12	100 %	16	100 %	20	95.0%
Office and Clerical	38	94.7%	34	94.1%	38	92.1%
Craftsmen	79	93.7%	76	93.4%	94	86.2%

All in all, the court has concluded that the procedures for promotion which defendants employ tend to perpetuate the past discrimination suffered by blacks at defendants' Cleveland plant. All the criteria used in the promotion process, while racially neutral on their face, suffer from this failing. Reliance upon length of service must have some adverse effect upon blacks because of their prior exclusion from defendants' noncustodial work force. Use of the twelfth grade requirement has a clearly adverse effect upon blacks in and around Cleveland, Mississippi as was seen earlier. And dependence upon the recommendation of defendants' predominantly white supervisory force is a "ready mechanism" to further impede black access to the supervisory ranks. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 240-43 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972). The court is of the opinion that, at the minimum, defendants should be required to refrain from use of the twelfth-grade education requirement and to develop and utilize some objective criteria for selection of operatives to be promoted to supervisory positions which will be racially neutral both on their face and in effect. *Pettway, supra,* at 241.

The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force. The full extent of the cumulative effect of these policies is perhaps not yet appreciated by Travenol management, but the statistics brought forth in this case cannot fail to convince an objective observer that employment opportunities at Travenol's Cleveland plant were certainly and to some extent remain, far from equal at the times pertinent to this case.

While it is no doubt true that a great deal of the segregated nature of defendants' operation in Cleveland may be traced to the racial discrimination which has historically permeated American society in general, by passage and implementation of the Civil Rights Act of 1964, the Congress of the United States announced that the time has arrived to bring minorities into the work force of the nation's industries on an equal footing with persons of the majority race. As the Supreme Court has stated:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 36 L. Ed. 2d, 668, 676, 93 S. Ct. 1817 (1973).

On the record in this case, the court is constrained to hold that Travenol's employment practices, particularly prior to 1973, were not consistent with the requirements of Title VII and its underlying purposes and goals. Ac-

cordingly, it will be necessary for defendants to make some adjustments in their employment practices in order to comply with the law of the land.

Sex Discrimination

From February of 1965 until 1968, the master job order form used by the Cleveland office of the state employment services (MSES), specified "male" as a requirement for the material handler positions at the Travenol plant and "female" for the assembler positions. At some point during the summer of 1968, Travenol's personnel manager visited the Cleveland office of MSES and requested elimination of the sex designations on the referral forms. However, sex identification of the assembler position was such in the minds of prospective job applicants that no male applied for an assembler position at defendants' plant until March 31, 1971. Likewise, no females applied for the material handler positions until November of 1971. Defendants did, however, in December 1970, provide female assemblers an opportunity to transfer to material handler positions. Two female assemblers accepted the invitation to transfer. Later, in 1971, a number of female assemblers became material handlers, but ultimately all chose to return to the assembler position.

By the fall of 1972, women made up 100 percent of the assembler work force, but only 2.6 percent of the material handler work force. As was mentioned earlier, assemblers are compensated at a substantially lower rate of pay than material handlers.[8]

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[8] Historically, the assembler pay rate has been closely related to that of the custodial or janitorial staff. In 1965, assemblers were paid four cents per hour more than custodians while material handlers were paid twenty-seven cents per hour more than assemblers. Since 1965, the assembler pay rate has remained tied to that of the custodial work force while the gap between the material handler and assembler pay rates has widened considerably. In 1974,

One of the most arduous and physically demanding positions at defendants' plant is known as the "hooks" job. The hooks positions are occupied by material handlers whose chief job duty is to place empty bottles on and remove filled bottles from the production line. The hooks positions are found only in the solution filling and solution packing departments of the plant. Of the approximately two hundred material handlers employed at defendants' Cleveland plant, about half are assigned to the filling and packing departments. Approximately half the material handlers in these departments—forty to fifty individuals—are assigned to the hooks jobs.

Although there was no policy concerning assignments to the hooks positions prior to 1966, at some point subsequent to that time a practice was established whereby those material handlers performing the hooks job would have the first option—the right of first refusal—at any vacancies which might develop in the other material handler positions within the filling and packing departments. As might be imagined, this policy became necessary because the physical exertion inherent in the hooks positions caused them to be regarded among the employees as somewhat less desirable than the other material handler jobs.

When a vacancy develops in a material handler's job, defendants ordinarily announce its existence to all persons then working as assemblers or material handlers. Each material handler interested in a lateral transfer and each assembler interested in upgrading to a material han-

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assemblers were paid only three cents per hour more than custodians but material handlers were paid forty-six cents per hour more than assemblers.

As of July 5, 1974, the starting pay rate for material handlers was $3.11 per hour, for assemblers $2.65, and for custodial employees $2.62 per hour.

dlers job may request a transfer and/or promotion. However, material handlers in the hooks positions are given first refusal on the vacancy. Hooks workers very rarely decline offers to transfer to non-hooks positions. This right of first refusal has the effect of transforming any material handler vacancy into a vacancy on the hooks jobs.

Placing the matter in context and considering all the evidence offered at trial the court, as fact finder, has concluded that the defendants, intentionally or otherwise, have structured the material handler jobs at their Cleveland plant so that while the vast majority of them require little heavy lifting, there are a few positions—particularly the hooks jobs—which required a great deal of heavy lifting. The prospect of facing the requirements of the duties of a hooks worker has been an almost foolproof method of blocking the entry of females into the material handler work force. Of the thirteen females initially assigned as material handlers who quit their jobs because of physical inability to perform, eleven—or 84.5%—were assigned to the hooks positions. Among the forty-four female assemblers who declined promotion to material handler between August, 1971 and April, 1973, thirty-nine—or 88.6%—turned down the promotions because they would have found themselves assigned to the hooks positions in the solution filling or solution packing departments.

Although Travenol's management was and is aware that the spectre of the hooks position is effectively preventing entry of women into defendants' material handler work force, there has been no attempt to devise alternative methods of staffing the hooks positions. Because of the devastating impact of the hooks requirement on the movement of females into the material handler work force, Travenol must make at least some attempt to accommodate its employment practices with the goals and requirements of Title VII. EEOC Decision No. 71-1868, April 22, 1971, ¶ 6266, CCH EEOC Decisions (1973); EEOC Deci-

sion No. 72-0561, December 20, 1971, ¶ 6308, CCH EEOC Decisions (1973).

SEX DISCRIMINATION RELATIVE TO PREGNANCY

Until 1972, defendants required pregnant employees to take a mandatory six month maternity leave without pay. The leave was required to begin three months prior to the expected date of delivery and to continue until three months after delivery. In May 1972, Travenol instituted a new policy allowing a pregnant employee to continue work prior to delivery so long as her doctor considered it advisable. The policy currently in effect also allows a new mother to return to work following delivery whenever the attending physician advises that a resumption of employment would present no health problems. Under the present policy, maternity leave is still without pay.[9]

In contrast to their forced leave policy regarding pregnancy, the defendants have never required employees suffering from any other sort of medical problem or disability to take leave, particularly leave without pay, for a predetermined period of time.

Travenol maintains a salary continuation plan for the employees at its Cleveland plant which provides for payments at varying rates for certain categories for employees in the event of a disability precluding gainful employment. Although the plan provides for wage continuation during period of temporary disability due to other non-occupational causes, it does not provide payments for temporary pregnancy-related disabilities or for inability to work due to the pregnancy itself. However, the plan does

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[9] The company policy in this regard is set forth in the following language:

> "Maternity leaves of absence will be unpaid until such time as it is definitely determined that applicable law requires otherwise."

provide for payments for disabilities caused by male gender-linked conditions, such as circumcision and hemophilia, and some disabilities more common among males, such as gout and prostatectomy.

Defendants argue that including payment for temporary pregnancy-related disabilities within the coverage of the salary continuation plan would substantially increase the costs of the plan and result in fewer benefits for all employees. The EEOC regulations on this point, which are entitled to "great deference", appear to counter defendants' argument neatly.

> It shall not be a defense under title VII to a charge of sex discrimination in [fringe] benefits that the cost of such benefits is greater with respect to one sex than the other. 29 C.F.R. § 1604.9.

Although there has as yet been no ruling by the Supreme Court on the question of whether the exclusion of pregnancy-related disabilities from fringe benefit programs—such as an income protection plan—maintained by an employer transgresses the terms of Title VII, the Court addressed a related, albeit distinguishable, issue in Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974). In *Aiello,* the court held that the State of California did not violate the Equal Protection Clause of the Fourteenth Amendment by failing to include disabilities relating to normal pregnancy under the coverage of its statewide and completely employee funded disability insurance program.

Although defendants argue that *Aiello* is dispositive of the pregnancy disability issues here, the court is more inclined to agree with the analysis of *Aiello* contained in Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3rd Cir. 1975), cert. granted, 421 U.S. 987, 44 L. Ed. 2d 476, 95

S. Ct. 1989.[19] if for no other reason but that in *Aiello* the standard against which defendants' conduct was measured was a constitutional one whereas here it is statutory (Title VII). Two other appellate courts have similarly interpreted *Aiello*. Communications Workers v. American Tel. and Tel. Co., 513 F.2d 1024, 1030-31 (2nd Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661, 665-67 (4th Cir. 1975). Accordingly, the court is of the opinion that, in order to comply with Title VII, Travenol must extend full and equal coverage of all its fringe benefit programs to women. Particularly, the disability leave and salary continuation programs must be altered so as to discontinue disparate treatment of pregnant employees, pregnancy, and pregnancy-related disabilities.

Seniority Rights

Having found defendants' hiring and promotion policies violative of Title VII as to both blacks and females, the court must finally address the legality of the procedure employed at the Cleveland plant to determine which employees will be affected in the event of a lay-off or other reduction in the work force.

So far as the evidence shows, Travenol's Cleveland plant never experienced a lay-off until 1972. As a matter of fact, prior to 1972 the defendants had not even formulated a plan or procedure for use in the event of a lay-off. Not surprisingly, the lay-off policy adopted in 1972 was the customary "last hired/first fired" standard.

The 1972 lay-off at the Cleveland plant had a disproportionately adverse effect upon black females. At the time of the lay-off, there were 1068 persons employed as

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[19] Although the Supreme Court's ultimate disposition of *Wetzel* would be of great benefit in determining the issues in this case relating to pregnancy, the court does not feel justified in delaying decision on the point pending the outcome of *Wetzel*.

operatives at Travenol's Cleveland plant. A total of 225 persons were laid-off in the course of the reduction in work force. Of the 306 males employed as operatives at the time, 56, or only 15% of the male work force, were detrimentally affected by the lay-off. Of the 566 white female operatives employed at the time, 87, or only 15.4% of the white female operative work force, were laid-off in the course of the reduction in employees. But of the 196 black females employed as operatives at the time of the lay off, 41.8%, or 82 black women, were adversely affected.

It appears that the law concerning lay-offs which disproportionately affect females and minorities is an even more unsettled state than that concerning pregnancy disabilities, if such is possible. Of course, the court has not been left completely adrift for, as the Fifth Circuit has said, in an employment discrimination case, it is the duty of the district court in the exercise of its discretion, "to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination." Franks v. Bowman Trans. Co., 495 F.2d 398, 414 (5th Cir. 1974), cert. granted, 420 U.S. 989, 43 L. Ed. 2d 669, 95 S. Ct. 1421 (1975). In the context of considering the legality of a seniority system of an employer which has been found, at some point in the past, to have engaged in unlawful employment practices, the difficulty arises in determining whether the employees now seeking relief from operation of the seniority plan are, in fact, discriminatees under Title VII.

In this circuit, this issue was most recently addressed in Watkins v. United Steel Workers, 516 F.2d 41 (5th Cir. 1975). In *Watkins*, the court refused to disturb the operation of a last hired/first fired lay-off plan, meticulously couching its holding in the following language:

> We hold that, regardless of an earlier history of employment discrimination, when present hiring prac-

> tices are nondiscriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or § 1981 [of Title 42 of the U.S. Code], even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks for the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination. 516 F.2d at 44-45.

The holding in Watkins is inapplicable to the instant case for many reasons; however, it does point out the various factors which must be considered when determining whether a seniority system somehow fails to comply with Title VII. In the case at bar, the court has found that the employer has a recent history of employment discrimination in the hiring process as to both race (education requirements) and sex (exclusion of females from the material handler work force). In fact, the court has determined that the employer here is presently engaging in some unlawful employment practices as to both females and blacks. Here, in contrast to *Watkins*, the seniority system employed in the event of layoff is of recent origins, having been initially instituted in 1972. Further, it is clear that some of the employees who would be and were affected in the event of a lay-off have themselves been the victims of prior discrimination in hiring practices. For example, it appears likely that, absent the tenth-grade education requirement which the court has found unlawful under Title VII, Ms. Cherry's plant-wide seniority would date from 1970, and that of Ms. Griffin from 1966.

Pending the decision of the Supreme Court in *Franks*, *supra*, it is apparently the law in this circuit that only those black and/or female employees who have been pre-

vented from attaining their "rightful place" of employment *as individuals* by their employer's unlawful practices are entitled to any relief from a last hired/first fired lay-off system.[11] In other words, only those members of the plaintiff class in this case who can show that, but for Travenol's unlawful discrimination, they would have acquired such seniority rights as to afford them to some degree of insulation from the adverse effects of a lay-off are entitled to any relief from the across-the-board operation of the seniority system. Because such a determination may require a case-by-case examination as to the factual situation of each member of the class, it is impossible for the court to frame any sort of relief at this juncture, having thus far inquired into the merits of the case as to the existence of unlawful discriminatory practices only. However, it is clear at this point that some modification of the last hired/first fired lay-off policy will be required in order to afford the black victims of the tenth and twelfth grade requirements and the female victims of the job assignment discrimination their rightful places within the structure of the seniority system.

Conclusion

By way of summary, the court has determined that, for the reasons set forth in this opinion, an injunction should be issued prohibiting defendants from requiring a tenth grade education (or GED equivalency) of applicants for operative positions; barring defendants from requiring a twelfth grade education (or GED equivalency) of applicants for office and clerical jobs, technician jobs, and supervisory positions; and enjoining Travenol from requiring a college degree as a qualification for the jobs of systems, traffic, or scheduling analyst. The court will also

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[11] Apparently such is also the law in the Second Circuit. See Chance v. Board of Examiners, —— F.2d —— (2nd Cir. 1976), 44 U.S.L.W. 2343 (Jan. 19, 1976).

enter an order directing defendants to include pregnancy and pregnancy-related disabilities under the coverage provided in the salary continuation plan currently in effect on the same basis as all other disabilities. However, either because the record has not yet been sufficiently developed or because the court does not intend to undertake to assume the management of defendants' plant on a day-to-day basis, the court is not presently in a position to rule on the backpay question, the specific alterations to the defendants' seniority system which are necessary to afford certain employees their "rightful places", or the question of modification of the manner in which employees are assigned to the hooks positions in the solution packing and filling departments. On these issues, the court has determined to require the parties to submit suggestions and proposals as to how the court should approach disposition of these questions. An order will be entered accordingly.

This 19th day of February, 1976.

/s/ ORMA R. SMITH

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE v. TRAVENOL LABORATORIES, INC

No. DC 72-13-S

Filed December 9, 1976

MEMORANDUM OF DECISION

The action sub judice came on for trial before the court sitting without a jury on March 3, 1975. The hearing was limited to the issue of liability, the appropriate relief, if any, being deferred for later consideration.

After a lengthy trial, the court handed down its Memorandum of Decision on February 19, 1976.[1] The defendants were held liable for unlawful discriminatory employment practices as to a class of individuals, tentatively described by the court as follows:

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility

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1. Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 (N.D.Miss. 1976).

operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class. 416 F.Supp. at 253.

The court entered an order on February 19, 1976, directing the issuance of a preliminary injunction enjoining defendants from

> (a) Discrimination on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above-captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action;
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> (b) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment

for operative positions in defendants' said facility;

(c) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in office, clerical, technician and supervisory positions in defendant's said facility; and

(d) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendant's said facility.

The order further provided:

(4) That such other or further relief as plaintiffs and members of the class which they represent may be entitled to receive pursuant to the court's memorandum of decision herein released shall await further action of the court, and in contemplation of such other or further relief the parties are directed to

(a) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals concerning modification of the seniority system currently in effect at defendants' Cleveland, Mississippi, facility so as to afford those black and/or female employees at the aforesaid facility who have personally and individually been adversely affected or discriminated against by defendants' hiring, promotion,

and transfer practices their "rightful places" within the aforesaid seniority system.

(b) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals as to how the court might proceed in ascertaining the extent of defendant's liability for monetary damages in the nature of backpay to the named plaintiffs in this cause and the members of the class which they represent, including proposals or suggestions as to whether additional notice should be furnished those persons who responded to the notice of pendency of action by indicating a desire to opt-out and, if so, the contents of such supplemental notice.

(c) File with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, suggestions or proposals as to how the defendants' job assignment system currently in effect at its Cleveland, Mississippi facility and pertaining to the staffing of the "hooks" position at such facility may be modified in order to cease impeding the entry of females into defendants' material handler work force in such a way as the court has found in its memorandum of decision, released this day, to violate Title VII of the Civil Rights Act of 1964.

> (d) To file with the clerk, serve upon counsel opposite, and submit to the court, within twenty (20) days of the date of entry of this order, any request which the parties may have for specific findings or conclusions by the court on any issues in contention in this case which are not contained in the Memorandum of Decision released this day in this cause.

Pursuant to paragraph 4(d) of the injunctive order the parties submitted voluminous requests for specific findings and conclusions. These dealt, for the most parts, with facts and conclusions necessarily considered and acted upon by the court in arriving at its ultimate determination of the issues involved. The requests were denied by order entered May 5, 1976.

The parties have filed with the court numerous motions relating to the relief to be accorded plaintiffs and members of their class as the result of the court's finding of liability. The defendants perfected an appeal to the United States Court of Appeals

for the Fifth Circuit from the court's memorandum of decision, order and injunction of February 19, 1976. The notice of appeal was filed March 19, 1976, and the appeal is now pending.

The court entered an order on May 5, 1976, directing that all pending motions be held in abeyance pending disposition of a motion to dismiss the appeal filed by plaintiffs with the Court of Appeals.[2]

On June 21, 1976, the clerk received a copy of an order theretofore entered by the Court of Appeals granting plaintiffs' motion to dismiss appeal, except as to the injunction issued by this court on February 19, 1976,[3] but denying a motion to stay

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2. Subsequent to the appeal by defendants from the court's decision, order and injunction of February 19, 1976, plaintiffs filed a motion in the Court of Appeals seeking to have the appeal dismissed so that the trial court could bring the case to final judgment on all issues and thereby avoid multiplicitous appeals.

3. The order was entered June 15, 1976 in Cause No. 76-1801, styled Willie Mae Payne, et al, (footnote continued)

defendants' appeal from the injunction aforesaid or remand the case to this court for a ninety day period.

Upon receipt of the order of the Court of Appeals, this court entered its own order on July 7, 1976, directing the parties to present to the court within 20 days such other or further suggestions as the parties might deem appropriate response to the directives of paragraphs 4(a), 4(b), and 4(c), to the court's February 19, 1976 order.

Before the entry of the court's orders of May 5, 1976, and July 7, 1976, plaintiffs, on March 18, 1976, filed their motion for the entry of a decree which accompanied the motion. The proposed decree is 25 pages in length, and includes many provisions based upon findings which the court has not yet made. The proposed decree is divded into nine separate sections or divisions and contains 62

Plaintiffs - Appellees v. Travenol Laboratories, Inc., and Baxter Laboratories, Defendants - Appellants.

paragraphs. It deals with such matters as educational requirements, hiring provisions, job assignment procedures, job assignments, layoffs and recalls, employee compensation and benefits, resolution of disputes under the decree, and provisions for information.

The class in this action, the members of which are entitled to individual relief, is made up of all present, past and future black female employees and all present, past and future black female applicants for employment at the Travenol Plant subject to the restriction that all such applicants for employment prior to March 3, 1970, and all such employees whose employment was terminated prior to March 3, 1970, are excluded from the class. The class is further restricted in that all black female applicants for employment at Travenol who lack a tenth grade education or its equivalent or who were not referred for employment at Travenol by the Mississippi State Employment Service

during the period such referral was required are excluded from the class.

In the concluding paragraph of the court's February 19, 1976, Memorandum of Decision, the observation was made:

> However, either because the record has not yet been sufficiently developed or because the court does not intend to undertake to assume the management of defendants' plant on a day-to-day basis, the court is not presently in a position to rule on the backpay question, the specific alterations to the defendants' seniority system which are necessary to afford certain employees their "rightful places", or the question of modification of the manner in which the employees are assigned to the hooks positions in the solution packing and filling departments. On these issues, the court has determined to require the parties to submit suggestions and proposals as to how the court should approach disposition of these questions.

416 F.Supp. at 266.

In compliance with the court's observation above-quoted and in an effort to fashion a decree affording adequate relief to plaintiffs and members of their class, an order was entered directing the parties to

submit suggestions or proposals for the modification of the seniority system existing at the Travenol plant so as to afford the injured members of the class their "rightful places" within the seniority system, for the manner in which the court should proceed to determine the liability of defendants for backpay to the injured plaintiffs and class members, and for a change in the manner in which the "hooks" position in the plant is staffed to remove the impediment to females in the material handlers work force. Since the entry of the decree, the court has been informed that the "hooks" position has been eliminated. All questions relating to these positions are, therefore, considered by the court to be moot.

It was in response to the court's order that plaintiffs submitted the proposed decree. The parties have presented their respective positions with reference to the decree in memoranda and oral argument.

On December 20, 1974, the court entered an order herein requiring that a

notice be sent to all known potential class members giving notice of the pendency of the action and that each such potential class member would be bound by the outcome of the action unless she elected to "opt-out" of the suit. The membership of the potential class was determined by the use of the records of defendant Travenol. A total of 2,045 notices were mailed to potential class members, of which number 483 represented duplicate notices unavoidably sent to the same individuals. Thus notices were mailed to 1,562 different individuals. An examination of the records in the clerk's office reflects that 211 of the 1562 mailings were returned by the post office to the sender undelivered. Eliminating the duplicate notices and those returned as undelivered, a total of 1351 potential class members received as of February 7, 1975, notice of the pendency of this action. The records in the clerk's office reflects that 523 requests

for exclusion were received by the clerk's office as of February 7, 1975. Thus, 828 potential class members remain in the case.

Plaintiff's attorneys contend that out of the 523 who exercised the option to "opt-out" 13 evidenced a lack of understanding of the nature and extent of her rights. The court has examined the responses made by these 13 individuals and concludes that responses of 12 of them support plaintiffs' contention. Under such circumstances, at least for the present, these individuals should be included in the list of potential class members. The 12 potential class members are:

1. Willie Hollaway, Mound Bayou, Mississippi
2. Synovia Jackson, Cleveland, Mississippi 38732
3. Blondine Harris, c/o David L. Harris, Sr., Route 1, Box 103, Mound Bayou, Mississippi
4. Mae Jean Jackson, 900 White, Apt. 10, Cleveland, Mississippi 38732
5. Willie B. Taylor, Box 624, Rosedale, Mississippi 38760
6. Herbye Ann Smith, Box 107, Pace, Mississippi 38764

7. Mattie Belfoure, 3240 Jones Rd., Memphis, Tennessee
8. Willie B. Tenzy, Box 135, Pace, Mississippi 38764
9. Mary Anna Christian, Route 1, Box 139, Duncan, Mississippi
10. Beulah Mae Foster, Dufford St., Box 761, Shelby, Mississippi 38774
11. Bonnie J. Hutchines, Lampton St., Box 101, Mound Bayou, Mississippi 38762
12. Doreatha Thompson, 900 White St., Apt. 66, Cleveland, Mississippi 38736

Thus, the potential class consists of 840 individuals who must be considered for individual relief.

The court has reached the conclusion that a final determination of the appropriate class should now be made. The court finds that the class heretofore tentatively described, should be the class of individuals who are entitled to participate in the back-pay award and other related relief to be afforded members of the class.

The trial in March, 1975, was devoted to the issue of liability, and it was then envisioned that should liability be found,

a second hearing on the appropriate relief would be afforded the parties. A review of the record convinces the court that a proper decree for appropriate relief cannot be fashioned without further hearing to up-date Travenol's present operations.

The nature and extent of the relief depends to a large extent upon the findings of the Fifth Circuit on the pending appeal.

For the reasons stated, the court has decided to stay further proceedings herein until the determination of the issues on appeal, with the exception of the court's final determination of the class description.

The propriety of the court's action in limiting the scope of the class which may be represented by plaintiffs is certain to provoke an appeal from one or both of the parties. The court deems it expedient to deal with this question at this time.

For the reasons advanced at former hearings on the issue, as reflected by the

court reporter's notes, the court has determined that the tentative class designation should now be made final.

The court finds that should either or both of the parties disagree with the court's finding and order on the composition of the class above-mentioned, an interlocutory appeal to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b) will materially advance the ultimate termination of the litigation, there being controlling questions of law as to which there is substantial grounds for difference.

The court's order will contain a statement to this effect.

An appropriate order is being entered by the court.

This 8th day of December, 1976.

/s/ Orma R. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE v. TRAVENOL LABORATORIES, INC.

No. DC 72-13-S

Filed December 9, 1976

ORDER

Pursuant to the Memorandum of Decision this day released herein, it is

ORDERED AND ADJUDGED:

(1) That the class which plaintiffs may represent in the action sub judice, heretofore tentatively established by the court, shall be and the same hereby is made final. The description of the class as finally established by the court shall be and the same hereby is described as follows:

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations that all black female

applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

(2) That the means, method and manner, in which the identity of class membership is to be determined and the backpay, if any, and further or additional injunctive relief, if any, to which members of the class may be entitled shall be and the same hereby are specifically reserved for adjudication at a later date; and

(3) That further proceedings herein shall be and hereby are stayed, pending the outcome of all appeals herein, unless such stay is vacated at the instance of any party or on the court's own motion.

Pursuant to the provisions of 28 U.S.C. § 1292(b), the court finds that this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that immediate

appeal from the order may materially advance the ultimate determination of the litigation.

This 8th day of December, 1976.

/s/ Orma R. Smith
United States District Judge

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Willie Mae PAYNE et al., *Plaintiffs-Appellees,*

v.

TRAVENOL LABORATORIES, INC.
and Baxter Laboratories, Inc., *Defendants-Appellants.*

No. 76-1801.

(Jan. 6, 1978.)

Appeal from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, AINSWORTH and RONEY, *Circuit Judges.*

RONEY, *Circuit Judge*:

This Title VII class action appeal involves four disputed paragraphs of an injunction. The first paragraph, being a general injunction against employment discrimination on the basis of "color, race or sex," violates Fed.R.Civ.P. 65(d), which requires specificity and detail in injunctive orders. It must be set aside. The next three paragraphs involve educational employment requirements of tenth grade, twelfth grade, and college degree for various jobs, which requirements are alleged to discriminate against prospective black employees. Because plaintiffs lack standing to contest the tenth grade requirement, the injunctive relief ordered in respect to that education requirement is set aside. The relief ordered as to the twelfth grade and college degree requirements is supported by the record, and is affirmed. Both parties agree that a fifth paragraph relating to coverage for pregnancy and related disabilities must be vacated in light of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Because the dis-

trict court's opinion has been published, it is unnecessary to relate again all of the details of this lawsuit. *Payne v. Travenol Laboratories, Inc.*, 416 F.Supp. 248 (N.D.Miss.1976).

General "Obey the Law" Injunction

Plaintiffs contend that a general injunction in this case should be permitted because the defendants' discrimination at the Cleveland, Mississippi, pharmaceutical manufacturing plant has been long, varied, and imaginative. Specific relief can be structured for the named plaintiffs, however, and the general relief in favor of a class of "all present, past and future black female employees and applicants at the Cleveland plant" carries the order beyond that permitted by the rules.

The paragraph enjoined defendants from discriminating on the basis of color, race, or sex in employment practices, prohibiting defendants from:

> (1) Discriminating on the basis of color, race, or sex in employment practices or conditions of employment in defendants' Cleveland, Mississippi facility, against the named plaintiffs in the above captioned action or either of them, or any member of the class which they represent, as such class is defined in the court's memorandum of opinion this day released in said action.

This paragraph clearly fails to satisfy the requirements that an injunction "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Fed.R.Civ.P. 65(d). This command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438-39, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976). The word "discriminating," like the word "monopolizing" in *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 125-26, 68 S.Ct. 947, 92 L.Ed. 1245 (1948), is too general. The provi-

sion is more specific than Title VII itself only in that it does not prohibit employment discrimination based on religion and natural [sic] origin. *See* 42 U.S.C.A. § 2000e-2. Such "obey the law" injunctions cannot be sustained. *See, e. g., NLRB v. Express Publishing Co.*, 312 U.S. 426, 435-36, 61 S.Ct. 693, 85 L.Ed. 930 (1941); *Russell C. House Transfer & Storage Co. v. United States*, 189 F.2d 349, 351 (5th Cir. 1951).

Tenth Grade Requirement: Standing

The second paragraph prohibited defendants from:

> (2) Requiring a tenth grade education (or its equivalency on a General Education Development [GED] test) of applicants for employment for operative positions in defendants' said facility.

Defendants attack this part of the injunction on the ground that the three named plaintiffs lack standing to question the legality of the tenth grade requirement. At the time crucial to the issue of standing, when the complaint was filed, all three of the named plaintiffs satisfied the tenth grade education requirement. Indeed, the trial court found that each of the named plaintiffs had fulfilled the requirement prior to submitting applications at the Cleveland plant. *Payne v. Travenol Laboratories, Inc., supra*, 416 F.Supp. at 251, 252. Thus plaintiffs can hardly argue that their rejections resulted from the imposition of a discriminatory educational standard.

To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that prospective relief will remove the harm. *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). As this Court recently noted in *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976):

> The fact that some members of the class may have had standing to raise this claim is irrelevant. . . .

> [T]he necessary requirement is for a *named* plaintiff to have standing at the time the litigation is filed. We are unaware of any case where any federal court has reached a substantive issue absent a named plaintiff who had standing at the time the action was filed.

Id. at 1269-70 (emphasis in original). Here, neither the named plaintiffs nor the class, which was defined to exclude black females lacking tenth grade educations, had standing to attack the tenth grade requirement.

Citing *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968), plaintiffs argue that a named plaintiff should not be forced to remain unqualified for potential employment during the lengthy pendency of litigation challenging the employment criteria causing his disqualification. In *Jenkins*, we held that the named plaintiff's acceptance of a promotion, subsequent to the filing of a complaint alleging racial discrimination in the company's promotional system, moots neither the individual claim nor that of the class. If an employer could negate an employee's standing to challenge discriminatory employment practices by the simple expedient of offering him unilaterally the relief he seeks for the class, the individual-initiated enforcement structure of Title VII would be seriously jeopardized. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). The principle, however, does not apply to the instant facts. Plaintiffs, due to no act of Travenol, possessed tenth grade educations and therefore lacked standing at the time suit was filed.

This case must be distinguished from those in which the named plaintiffs may have little qualifications for a particular job, without regard to the disqualifying requirement they attack, such as the analyst jobs discussed in the portion of this opinion dealing with Travenol's college degree requirements. Here the named plaintiffs and each member of the class were qualified on the precise requirement which they seek to set aside.

Plaintiffs also attempt to establish standing by noting that during at least 80 of the 90 days preceding the January 19, 1970, filing of plaintiff Willie Mae Payne's first EEOC charge, she failed to satisfy the tenth grade education requirement. No evidence appears in the record to suggest that Ms. Payne applied for employment during this 80-day period. Plaintiffs argue that the question whether Ms. Payne applied is irrelevant in light of the recent Supreme Court case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which holds that seniority relief should not be denied to a class member who did not apply for a job when applying would be futile because of the employer's discriminatory practices. In this case, however, the trial court's definition of the class removed from consideration all applications for employment submitted to Travenol prior to March 3, 1970, so that the situation prior thereto is irrelevant on this appeal.

Because we hold that plaintiffs lacked standing to challenge the tenth grade education requirement, we do not address Travenol's alternative contentions, first, that plaintiffs failed to prove the requirement had a disparate impact on blacks and, second, that the requirement was justified by business necessity.

Twelfth Grade Requirement

The third injunctive paragraph enjoins defendants from:

> (3) Requiring a twelfth grade education (or its GED equivalency) as a condition of employment in office, clerical, technician and supervisory positions in defendants' said facility.

In respect to his [sic] provision, defendants contend that the court measured the degree of disparate impact by an incorrect statistical referent. Travenol, citing *Robinson v. City of Dallas*, 514 F.2d 1271 (5th Cir. 1975), argues that

the trial judge should have drawn his statistics from Travenol's operative work force rather than the general population because most of the positions requiring twelfth grade educations are filled through the promotion of assemblers and material handlers. The evidence in this case, however, shows that although a large majority of the employees occupying positions subject to the twelfth grade requirement were promoted from operative jobs, a not insignificant number were hired from the general population. The trial court's consideration of general population data was therefore not improper. Evidence in the record amply supports the trial court's findings of disparate impact and lack of business necessity. The third paragraph of the injunction is therefore affirmed.

College Degree Requirement

The fourth injunctive paragraph enjoins defendants from:

> (4) Requiring a college degree as a qualification for the positions of systems, traffic, or scheduling analyst, in defendants' said facility.

Travenol challenges this part of the injunction on two grounds. First, it maintains that plaintiffs failed to prove the discriminatory impact of the college degree requirement. Travenol employed only five analysts subject to the college degree requirement and urges that positions having so few incumbents cannot properly be subject to statistical proofs of disparate impact. The proper focus when determining the disparate impact of an employment condition is on those excluded by the requirement, not on the number of positions to be filled as Travenol suggests. *See Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1294 (8th Cir. 1975). The record contains ample evidence that the college degree requirement, not adopted until 1968, rendered "ineligible [for employment] a markedly disproportionate number of Negroes . . . ." *Griggs v. Duke Power Co.*, 401

U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971). The defendants failed to prove that the requirement was justified by business necessity.

Second, Travenol maintains that plaintiffs' class action cannot properly extend to the employment practices applicable to analyst positions. In short, Travenol argues that the level of capability required for these positions is such that, even absent the college degree requirement, plaintiffs would never be serious candidates for them. Even assuming that the named plaintiffs were not strictly affected by the college education requirement, this Court's policy regarding class actions in employment discrimination cases dictates that plaintiffs could properly challenge Travenol's college degree requirement. Plaintiff's action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of those discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies. *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *see Long v. Sapp*, 502 F.2d 34 (5th Cir. 1974); *Jack v. American Linen Supply Co.*, 498 F.2d 122 (5th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

The injunction entered by the district court is reversed as to paragraphs (1) and (2) and the fifth unnumbered paragraph relating to pregnancy disabilities, and said paragraphs are hereby vacated and deleted. The injunction is affirmed as to paragraphs (3) and (4). Each party will bear his own costs in connection with this appeal.

REVERSED AND VACATED IN PART AFFIRMED IN PART.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

(Caption Omitted in Printing)

On Petition For Rehearing and Petition For Rehearing En Banc

March 28, 1978.

(Opinion Jan. 6, 1978, 5 Cir., 1978, 565 F.2d 985)

Before THORNBERRY, AINSWORTH and RONEY, *Circuit Judges.*

PER CURIAM:

The opinion of the panel is amended by withdrawing the following language appearing at 565 F.2d 898:

> Here, neither the named plaintiffs nor the class, which was defined to exclude black females lacking tenth grade educations, had standing to attack the tenth grade requirement.

and substituting therefor the following:

> Here, none of the named plaintiffs nor any member of the class had standing to challenge the tenth grade education requirement. From the class of "all past, present and future black female employees and applicants" the district judge excluded "all black female applicants who lack a tenth grade education or equivalency." Thus, unlike the situation presented by broadly defined Title VII classes without defined exclusions, no member of the class could claim to be aggrieved by the education requirement.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

WILLIE MAE PAYNE, et al.,

Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., et al.,

Defendants.

No. DC 72-13-S Filed: January 25, 1979

ORDER

To whatever extent there remains confusion among the parties concerning the following issues in this cause, no findings of fact other than the express and implicit findings in the Memorandum of Decision entered on February 19, 1976, and those necessitated by the order appointing Special Master this date entered herein shall be made, and at this juncture no change in the definition of the plaintiff class previously certified herein is

contemplated by the court.

This the 24th day of January, 1979.

/s/Orma R. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE v. TRAVENOL LABORATORIES, INC.

No. DC 72-13-S-P

Filed July 28, 1980

REPORT AND RECOMMENDATION

Pursuant to the order of reference entered herein on January 24, 1979, this cause is before the magistrate for report and recommendation on the necessity for and the extent of any further injunctive relief to be entered herein. After discovery related to such issue,[1] an evidentiary hearing on May 15, 1980, and submission of memoranda by the parties directed to such issue, entry of report and recommendation is now appropriate.

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1. Plaintiffs continue to complain of that portion of the order entered herein by the magistrate on December 7, 1979, and affirmed by order of the court on January 23, 1980, denying plaintiff's motion for an order compelling defendants to produce the documents requested by Request Nos. 1 and 2 of plaintiffs' requests for production filed in connection with this portion of the order of reference.

(footnote continued)

Defendants contend that no further injunctive relief in this action is warranted and, furthermore, that the existing injunction prohibiting use of certain educational levels as requirements for employment by defendants should be terminated. This position is wholly untenable. While the court has stated that

> The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well-intentioned management attempting to deal with job applicants and employees, equally on a case-by-case, or individual basis;

The requested documents contain information regarding every facet of defendants' work force, much of which is not at issue at this time, and discovery of such accordingly was denied. Plaintiffs complain, however, that denial of discovery of the requested documents precluded them from compiling specifics as to aspects of defendants' work force relevant to this stage of this litigation. It should be noted that the court has in no manner prohibited plaintiffs from propounding discovery tailored to the portion of the order of reference under consideration here. Plaintiffs' choice to maintain an all-or-nothing approach to discovery at this stage is of course their prerogative.

Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248, 261 (N.D. Miss. 1976), the court nevertheless found that defendants' practices had denied equal employment opportunities to blacks and women. Furthermore, the court noted that the degree of progress achieved by defendants in the racial composition of its operative work force at the Cleveland facility by the time of trial of this cause was the result of "the plaintiffs' charges with the EEOC and the subsequent institution of this lawsuit." Id. at 258. Moreover, "in equal employment opportunity cases a court cannot abdicate to defendants good faith its duty of ensuring removal of all vestigesof discrimination." Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975). In the magistrate's opinion, plaintiffs clearly are entitled to further injunctive relief.

Plaintiffs have submitted a proposed decree setting forth the injunctive relief

to which they claim to be entitled. The magistrate is of the opinion, for the reasons set forth below, that certain of plaintiffs' proposals are well taken, while others are not.[2] Copy of plaintiffs' proposed decree is attached hereto as Appendix 1, and this report will address plaintiffs' separate proposals by reference thereto.

Plaintiffs' initial request that the court retain jurisdiction of the cause to ensure compliance with injunctive measures ordered is well taken. Franks v.

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2. Plaintiffs, while recognizing that the magistrate is bound by the court's definition of the plaintiff class, nevertheless argue for a broader class certification. This is a matter which must be addressed to the district judge, who, by order of January 24, 1979, stated that "at this juncture no change in the definition of the plaintiff class previously certified herein is contemplated by the court." To the extent that plaintiffs argue that injunctive relief against racially or sexually discriminatory practices of defendants necessarily must encompass a prohibition of such practices against all blacks or all women, they are correct. Jenkins v. United Gas Corp., 400 F.2d 28, 34 n.15 (5th Cir. 1968). On the other hand, individualized relief must be limited to members of the plaintiff class.

Bowman Transportation Company, 495 F.2d 398, 421 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747, 47 L.Ed.2d 444 (1976). Rather than the open-ended retention of jurisdiction requested by plaintiffs, however, the magistrate is of the opinion that retention of jurisdiction for two years after entry of the court's injunctive order pursuant to this report is sufficient time to monitor compliance with such order. Id.

Plaintiffs' related request for a clause in the court's injunctive order permitting modification of the decree on motion and for good cause shown to remedy undue hardship or "to remedy more effectively the discrimination found" would, in effect, virtually ensure relitigation at a future date of the appropriateness of the injunctive relief ordered by the court pursuant to this report. To the end that this eight-year-old lawsuit may at some point become final, the magistrate is of the

opinion that the court should now order the injunctive relief it deems appropriate rather than leaving the matter subject to further litigation.

Plaintiffs' request in paragraph 3 of their proposed decree that paragraphs 3 and 4 of the injunction entered herein on February 19, 1976 be continued,[3] and plaintiffs' request in paragraph 4 that subjective discrimination by defendants on the basis of race or sex be enjoined are well taken. Defendants contend that the prior injunction should be terminated as there is "no reason whatsoever to believe that defendants intend or desire to reinstitute the practices

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3. In paragraph 6 of the proposed decree, plaintiffs also request an injunction against a 12th grade education or 12th grade GED equivalency certificate as a condition of employment in an Apprentice Mechanic position. The court implicitly found that the twelfth grade requirement for such position was racially discriminatory and unjustified, Payne, supra, 416 F.Supp. at 258-59, and such requirement accordingly should be enjoined.

condemned by the court," and that the court has found that subjective discrimination by defendants ended by the time of the court's decision in this case. As noted above, however, the court also found that defendants' progress in equal employment opportunities was caused by the instant litigation and the precedent administrative actions.

> This Court has held that absent clear and convincing proof of no reasonable probability of further non-compliance with the law a grant of injunctive relief is mandatory . . .. In Cypress v. Newport News General & Nonsectarian Hospital Ass'n, 4 Cir. 1967, 375 F.2d 648, 658, the Fourth Circuit made an observation relevant here, that has been cited by this Court several times: "'[P]rotestations or [sic] repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance' that the practice sought to be enjoined will not be repeated."

James v. Stockham Valves & Fittings Co., 559 F.2d 310, 354-55 (5th Cir. 1977), cert. den., 434 U.S. 1034, 54 L.Ed.2d 78 (1978). Under the circumstances of this case, the prior injunction should continue in effect,

and defendants should be enjoined from subjective employment discrimination on the basis of race and sex. To avoid the specificity problem previously encountered in this cause, Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897-98 (5th Cir. 1978) (reversing general injunction), such injunction however, should be directed to subjective discrimination in hiring and promotion decisions.

Plaintiffs further propose in paragraph 5 of their proposed decree that defendants be enjoined during the period of retention of jurisdiction from imposition of any new employee selection criteria without an advance determination as to the disproportionate effect vel non of such criteria on blacks or women because of their race or sex, and, if such disproportionate effect is likely to result from such criteria, without a validation of such criteria under the Uniform Guidelines on Employee Selection

Procedures 29 CFR Part 1607 (Uniform Guidelines). Plaintiffs further request advance notification of prospective imposition of such criteria and information obtained with regard to disparate impact and validation, and thereafter opportunity to object with the court, which will determine whether or not such criteria should be permitted.

> The federal chancellor has the nondiscretionary duty to end all discriminatory practices, past, present or future. To eliminate any doubt, we require that such relief be granted as is necessary to ensure the utilization of objective job-related criteria. The precise form of the decrees [sic] for the determination of the district judge

NAACP v. Allen, 493 F.2d 614, 622 (5th Cir. 1974). Here, the relief requested by plaintiff goes beyond that necessary for this aspect of defendants' practices. This court has previously indicated that it did not desire to unduly restrict defendants from experimenting with employee selection procedures. Payne, supra, 416 F.Supp. at 257. Appropriate relief with regard to changes by defendants in their employee selection

criteria is entry of an injunction that during the period of retention of jurisdiction, imposition by defendants of new employee selection procedures shall conform with the Uniform Guidelines.

In paragraph 7 of the proposed decree, plaintiffs request listing by defendants with the Mississippi State Employment Service of all vacancies to be filled by hire in jobs above the level of material handler or assembler; in paragraph 13.(a), plaintiffs seek continuation of the job posting procedure adopted by defendants on April 1, 1980, with an injunction against the six-month waiting period after last voluntary move, refusal of job award, or voluntary removal from a job as applied to black or female employees, and with an injunction against the six-month waiting period for newly-hired employees as applied to blacks who had earlier applied for employment and had been rejected; in paragraph 13.(b), plaintiffs

seek an extension of the job posting procedure to salaried job categories; and in paragraph 9, plaintiffs seek inclusion in posting of job vacancies of a statement of the name, shift, and pay rate for the vacancy, and for material handler jobs, a statement of the physical effort required, with a provision that applicants be permitted to examine defendants' job descriptions for vacant positions.

Defendants' voluntary job posting procedure adopted on April 1, 1980, extends only to hourly jobs. However, this court has found that defendants' "[f]ailure to post information concerning vacancies in the clerical, technician, and supervisory positions. . . impedes the access of the company's black employees to the better paying and more desirable jobs." Payne, supra, 416 F.Supp. at 260. Defendants' contention that "[p]osting of vacancies in bi-weekly positions is not feasible" simply does not establish such

to be the case. With regard to the six-month waiting periods of defendants' job posting policy, it is a "well-established principle that a promotion and transfer system which impedes the attainment by formerly discriminated-against class members of their rightful place within the company must be justified by business necessity." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1194 (5th Cir. 1978), cert. den., 439 U.S. 1115, 59 L.Ed.2d 74 (1979). Here, the six-month waiting period obviously may operate to slow the rise of class members to their rightful place of employment, and defendants have made no effort to justify the waiting period in terms of business necessity. The waiting period accordingly should be enjoined, Pettway, supra, 576 F.2d at 1198 n.44; "[t]he requirement that bidders for a higher position. . . be 'qualified' to fill the vacancy fully protects the company's interest in plant safety and efficiency." Id. Rather

than enjoining the six-month waiting period in the piecemeal terms as proposed by plaintiffs, however, the six-month waiting period should be enjoined in its entirety to permit application of uniform policies to class members and other blacks or female employees. The additional posting and dissemination of job vacancy information proposed by plaintiffs in their paragraph 7 and 9 are reasonable, and can be expected to aid in eliminating the vestiges of defendants' past discriminatory employment practices.

The injunctive relief sought by plaintiffs in paragraph 8 of their proposed decree, viz., an injunction against consideration by defendants in hiring of the fact that a woman has illegitimate children, is not warranted, assuming that this issue is before the magistrate by the order of reference, which the magistrate does not believe it is. The sole support of this request by plaintiffs is an admission that prior to

1972, defendants considered such in hiring decisions. The fact that such policy was voluntarily terminated by defendants in 1972, with absolutely no indication of a desire to reinstate it since then, directs that this requested relief be denied.

Paragraph 10 of plaintiffs' proposed decree, limited to members of the plaintiff class, and limited to unhired class members who applied for employment prior to February 19, 1976, provides priority in hiring to otherwise qualified identifiable victims of defendants' past discriminatory practices, and is an appropriate remedy. As a named plaintiff in this action filed approximately eight years ago, plaintiff Griffin should be granted first priority for consideration for employment under the provisions of plaintiffs' paragraph 10.(b).

In paragraph 11 of their proposed decree, plaintiffs seek quota relief with regard to hiring of blacks into defendants' clarical [sic]

jobs. As late as August 1974, no black had ever been hired by defendants for an office or clerical job. Payne, supra, 416 F.Supp. at 259 n.7. By the time of trial of this cause in March 1975, defendants had "integrated their office and clerical work force to some extent -- less than 10% [was] black . . . ." Id. By November 30, 1979, blacks comprised 22.8% of defendants' clerical employees.

Quota relief

> is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select . . . employees solely on the basis of job-related merit. For once an environment where merit can prevail exists, equality of access [is] satisfie[d].
>
> . . . It [quota hiring] is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee they would fail.

NAACP v. Allen, supra, 493 F.2d at 621. Here,

defendants have made significant progress in integration of their clerical work force. It can reasonably be assumed that the non-discriminatory "climate" created at defendants' facility by other recommended injunctive provisions, as well as by defendants' voluntary efforts, will result in an increasing percentage of blacks in defendants' clerical work force without the drastic remedy of quota hiring.

Plaintiffs in paragraph 12 of their proposed decree seek an injunction against disproportionate assignment of blacks to custodial jobs and women to assembler jobs, or men to material handler jobs. With regard to disproportionate assignment of females to assembler jobs and males to material handler jobs, the court found that by the time of initiation of this action, defendants had ceased overt sex requirements for such jobs, but that because of the policy of providing material handlers in the

"hooks" positions first refusal to other material handler vacancies, the material handler work force remained virtually all male. Payne, supra, 416 F.Supp. at 261-63. Testimony at the May 15, 1980 hearing establishes that the "hooks" job has been abolished, and that it has been replaced by the "bottle stack-on/stack-off" material handler position, which is significantly less physically demanding than the old "hooks" position. In the stack-on/stack-off position workers remove bottles by hand from an assembly line and stack them on pallets, with the largest bottle size being three liters. The lesser physical demands on the stack-on/stack-off position are reflected by the fact that in 1979, approximately 60% of the women hired into such position remained there. More importantly, under the job posting procedure adopted by defendants on April 1, 1980, stack-on/stack-off material handlers have no preference over other

operatives for other material handler vacancies; all operatives may bid for such openings on the basis of plant seniority. In view of these changes in defendants' practices concerning operative positions, the relief requested by plaintiff with regard to assignment of males and females to operative positions is not justified, with sufficient relief being an injunction requiring defendants to maintain their recently-adopted practice of filling material handler vacancies through their job posting procedure utilizing plant-wide seniority. Such relief would render that requested by plaintiffs in their paragraph 13.(c) superfluous.

Plaintiffs' request for an injunction against disproportionate assignment of blacks to custodial jobs is not justified on the record. As of November 30, 1979, blacks constituted 61.9% of defendants' operative work force, while comprising 70.8% of defendants' service or custodial workers. This small

dispairity[sic] does not reflect discrimination in assignment of blacks to custodial jobs, and does not justify the relief sought.

In paragraph 13.(d), plaintiffs request an injunction against quality control assemblers or material handlers being given any advantage over other employees in filling quality control technician positions. The evidence, while indicating that from 1975 through 1979, 10 of 14 promotions to quality control technician were persons previously working as quality control assemblers or quality control material handlers, does not establish any disparate impact on blacks or females solely from a practice of preferential promotions of quality control assemblers or material handlers to quality control technician. For the same years, women held 311 of 374 quality control assembler and material handler positions; blacks held 211 of the total positions. The requested relief accordingly is not warranted.

In paragraph 13.(e), plaintiffs request an injunction against providing material handlers preference over other employees in promotion decisions. The evidence establishes that while women constituted from 73.3% to 62.2% of defendants' operative work force from November 30, 1977 to November 30, 1979, during the same time women received only 20 of 96 promotions (20.8%) of operatives to group leader, defendants' initial level of supervision. Of these 96 promotions, 72 were promotions of employees who had previously worked as material handlers; of the 20 women so promoted, only 3 had material handler experience. These figures demonstrate a preference for material handlers - - the traditionally male operative position - - and, indeed, male material handlers, which justifies the requested injunctive relief.

In paragraph 13.(f), plaintiffs request

"red circling" relief, i.e.,

> allow[ing] a transferee to retain his old wage rate until he has had an opportunity to learn the necessary skills to progress in the new department to a salary equal to his old departmental wage rate.

Pettway, supra, 576 F.2d at 1200. While the evidence establishes that it is theoretically possible for custodians and assemblers to be required to take a pay cut upon promotion to an ultimately higher-paying position, plaintiffs have not pointed to a single instance where such has occurred, and the proof establishes that defendants in practice do not permit such. This being the case, red circling relief is not appropriate. "Full red circle rate retention must be provided where the class is able to show that limitations present a practical impediment to the transfer of any effective [sic] class member." Pettway, supra, 576 F.2d at 1202 (emphasis added).

Plaintiffs, in paragraph 14 of their

proposed decree, seek unspecified training for black and female employees affected by defendants' past discriminatory practices. Such relief is not justified on the record, especially in light of the nature of assembler and material handler positions to which the bulk of promotional relief will accrue.

> Assembler and material handlers work from place to place on the production line and must be familiar with each job involved. They are required, at times, to keep records and to add, subtract, and multiply. They must be alert, attentive, flexible and must be able to read, with an understanding of what they have read, and to follow instructions. Generally, material handlers and assemblers learn their respective duties from on-the-job training. The parties stipulated that the operative positions do not require any particular sort of previous employment on the part of the incumbent.

Payne, supra, 416 F. Supp. at 256.

The magistrate is of the opinion that with minor modifications, the seniority relief sought by plaintiffs in paragraph 15.(a) is appropriate. Sledge v. J. P.

Stephens [sic] & Co., 16 F.E.P. Cases 1652 (E.D. N.C. 1976). The constructive seniority lists to be compiled in accordance with such paragraph should, however, be limited to unhired class members reapplying under paragraph 10 of plaintiffs' proposed decree, and to class members laid off and not recalled, or presently employed,[4/] who affirmatively respond to notice in form approved by the court advising such class members of possible entitlement to constructive seniority, and providing opportunity to claim such. See Franks v. Bowman Transportattion Co., 424 U.S. 747, 772, 47 L.Ed. 2d 444, 466 (1976).

In paragraph 16 of the proposed decree, plaintiffs seek recall relief for laid-off

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4. Such provisions also should be limited to such class members who applied for hourly employment prior to February 19, 1976, and were not hired by that date.

blacks with greater constructive seniority than employees not laid off. This relief is appropriate only as it applies to class members, and only to the extent that any such class members should be given priority of recall, based upon their constructive seniority, as vacancies from time to time occur. Such employees also should be provided preference over those unhired class members reapplying pursuant to provisions similar to those in plaintiffs' proposed paragraph 10.

Paragraph 17 of plaintiffs' proposed decree is too general to provide any guidance to defendants were it adopted, and would in effect eliminate any distinction between defendants' assembler and material handler job categories. The provision is unnecessary to afford the plaintiff class appropriate relief, and it should be rejected.

Plaintiffs' proposed paragraph 18

addresses an issue not before the magistrate by the order of reference, viz., remedial relief with regard to pay rates in defendants' "merit system" job categories. There has been no finding in this cause of discrimination in merit system pay of blacks and women vis-a-vis white males.

In paragraphs 19, 20 and 21 of the proposed decree, plaintiffs ask the court to require defendants to establish an internal grievance system for complaints of non-compliance with the injunctive order issued pursuant to this reference, with the court being the final arbiter of any disputes which members of the plaintiff class, or their counsel, cannot resolve with defendants. This requested relief goes beyond that appropriate to remedy defendants' past discriminatory practices, has the obvious potential for involving the court in continuous squabbling over defendants' employment

decisions, regardless of the magnitude of the grievance involved, and accordingly should not be granted, other than to require defendants to "designate an official who will have responsibility for securing compliance with [the injunctive relief ordered]." Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100 (N.D. Ga. 1976).

In paragraph 22.(a) of the proposed decree, plaintiffs request certain actions to ensure dissemination of the court's injunctive order. In lieu of plaintiffs' proposals, however, defendants should be required only to post copies of the court's order at conspicuous locations in its plant.

In paragraphs 22.(b) and (c), plaintiffs ask the court to require defendants to make available to plaintiffs' counsel during working hours defendants' cafeteria for meeting with members of the plaintiff class, and to require defendants to post

notices to class members concerning the availability of plaintiffs' counsel to communicate with them concerning this litigation. The first request is inappropriate, as it would obviously disrupte [sic] defendants' business operations, and is not necessary to afford the plaintiff class the relief to which they are entitled. Similarly, the court should not countenance the second portion of the relief requested, especially since by order entered this date, plaintiffs' counsel is being freed to initiate contacts with members of the plaintiff class.

In paragraphs 23 through 26, plaintiffs request the court to require defendants to submit extensive reports on compliance with the injunctive relief ordered, and to permit plaintiffs' carte blanche access to all of defendants' personnel records. Defendants should be required to prepare only those records "sufficient to assess

compliance with Title VII," U.S. v. Jacksonville Terminal Co., 451 F.2d 418, 460 (5th Cir. 1971), cert. denied, 406 U.S. 906, 31 L.Ed.2d 815 (1972). The reporting requirements requested by plaintiffs' proposed paragraph 25 are sufficient to fulfill this standard, and are all that should be required of defendants, with copies of such reports of course to be provided to counsel for plaintiffs.

For the foregoing reasons, the magistrate recommends entry of the final decree submitted herewith which incorporates the changes in plaintiffs' proposed decree outlined above, and which will provide appropriate final injunctive relief to the plaintiff class for defendants' past discriminatory practices.

Respectfully submitted, this 24th day of July, 1980.

/s/ Charles M. Powers
United States Magistrate

[Plaintiffs' proposed Decree omitted]

[Decree recommended by the Magistrate was entered and is set forth at App. 265a - 279a]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE v. TRAVENOL LABORATORIES, INC.

No. DC 72-13-S-P

Filed August 18, 1980

ORDER

Upon due consideration of the Report and Recommendation of the United States Magistrate entered herein on July 24, 1980, and the objections of the parties thereto, the court finds that said objections are not well taken, and it is accordingly

ORDERED:

That the Report and Recommendation of the United States Magistrate is hereby adopted as the opinion of the court.

This, 18th day of August, 1980.

/s/ Orma R. Smith,
Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE v. TRAVENOL LABORATORIES, INC.

No. DC 72-13-S-P

Filed August 18, 1980

DECREE

This action was tried before the court on March 3-14, 1975. Findings of Fact and Conclusions of Law were entered on February 19, 1976, and an injunction against some of the practices found to be discriminatory was also entered on that date. The defendants thereafter took an appeal from the entry of the injunction, and the injunction was affirmed in part and reversed in part. Report and Recommendation of the United States Magistrate having been filed pursuant to the order of reference entered on January 24, 1979, and having this date been adopted by the court as its opinion, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. The court will retain jurisdiction over this case for two years from this date, provided that all litigation concerning back pay to class members has been concluded by such time. Reporting requirements shall terminate upon the expiration of this court's retention of jurisdiction.

2. The defendants shall continue to obey the provisions of paragraphs 3 and 4 of the injunction entered herein on February 19, 1976.

3. The defendants shall not permit their personnel or supervisory officials to engage in subjective discrimination on the basis of race, and shall not permit such officials to engage in subjective discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., or of 42 U.S.C. § 1981, in hiring and promotion decisions.

4. During the period of retention of jurisdiction, the defendants shall not impose any new, facially-neutral selection criteria for hiring, transfer, or promotion unless such are adopted in accordance with the provisions of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 et seq.

5. The defendants shall not require any applicant or employee to have a 12th-grade education or 12th-grade G.E.D. equivalency certificate as a condition of employment in an Apprentice Mechanic position.

6. The defendants shall inform the Mississippi State Employment Service of all vacancies to be filled by hire, in jobs above the level of Material Handler and of Assembler, so that information as to these vacancies may be spread more widely among blacks and women.

7. The defendants shall post notices, at every place at which they take applications

for employment, stating the name, shift and pay rate of every job category in which there is a vacancy to be filled by hire. In the case of Material Handler jobs, the type of job which is vacant, and the extent of the physical effort required by that job, shall be stated. Applicants shall be allowed to examine the defendants' position descriptions for any position which is then being posted as available to be filled by hire, and shall be informed of this right.

8.(a) Within 60 days from the entry of this Decree, the defendants shall write to all unhired applicant members of the plaintiff class of whom they have knowledge who applied for employment prior to February 19, 1976, inviting them to reapply if they are still interested in employment with the defendants. Such class members responding to this notice shall be given priority in hiring over other applicants,

as long as they keep their applicants [sic] active (1) until they have been disqualified, for every position customarily filled by hire, according to objective, job-related criteria, (2) until they have been hired in a non-custodial job category, or (3) until they have rejected an offer of employment in a noncustodial job category. The defendants shall keep a record of all responses to this invitation, and of their actions thereon.

(b) Plaintiff Griffin shall be given first priority for consideration for employment under the provisions of sub-paragraph (a).

(c) Such unhired applicants and present or former employee class members, whose prior application forms indicate either clerical skills or interest in clerical work shall be informed, as part of the notice described in sub-paragraph (a), of the right to reapply for clerical jobs.

The reapplicants responding to this notice shall be given priority in hiring for clerical jobs over other applicants for such jobs, as long as they keep their applications active, (1) until they have been disqualified for every clerical job category customarily filled by hire or by promotion of hourly-rated employees, according to objective, job-related criteria, (2) until they have been hired or promoted into such a clerical job category, or (3) until they have rejected an offer of employment or of promotion into such a clerical job category. The defendants shall keep a record of all responses to this invitation, and of its actions thereon.

9. (a) The defendants shall continue to use the job posting procedure for hourly jobs which became effective on April 1, 1980, other than the six-month waiting period for eligibility for promotions

contained in part 4.05.2 of the procedure, use of which shall be terminated. This provision shall not be construed so as to prevent the defendants from disqualifying any employee from consideration for upgrade or transfer on the basis of objective, job-related criteria. During the posting period, employees shall be allowed to examine the defendants' position description for the positions which are posted. The posting shall inform them of this right.

(b) The defendants shall use the job posting procedure described in subparagraph (a), as modified therein, for salaried job categories which have traditionally been filled by persons hired locally, as well as for hourly job categories.

(c) The defendants shall not give present or former Material Handlers any advantage over other employees in filling

Group Leader or other supervisory positions.

10. (a) Individual notice in form approved by the court shall be mailed by defendants to each class member laid off from hourly employment and not recalled, and provided to each class member presently employed in an hourly position, who applied for employment prior to February 19, 1976 and was not hired by that date, advising of such class members' possible entitlement to constructive seniority, and providing opportunity to claim such. The notice shall state that failure to claim constructive seniority shall constitute a waiver of such.

(b) Counsel for plaintiffs shall direct the compliance of a constructive seniority list of all class members affirmatively responding to the notices provided in accordance with paragraphs 8. (a) and 10. (a), and shall state for each such class member her name, date of hire, if applicable,

and date of first recorded application for employment with the defendants. In order to compile the constructive seniority list, plaintiffs' counsel and persons under their supervision shall be given access to all application forms for hourly employment for the years 1970-1975, and a list of names and dates of hire of hourly workers for such years. Each such class member's presumptive constructive seniority date shall be computed by determining the average waiting period before hire for white applicants during her application year and adjusting her hire date by the difference between such waiting period before hire and her actual waiting period before hire, if greater. The defendants may for any reason, they deem sufficient contest this presumption. If they do so, they shall provide a short, plain statement of their reasons for contending that the employee would not

have been hired then and would have been hired later, absent discrimination, and of the facts supporting such reasons. The defendants shall state therein their proposed alternative constructive seniority date and the reasons and facts supporting such a date. Copies of the list and of the defendants' statement shall be filed with the clerk and served on opposing counsel.

(c) Counsel shall confer and attempt to agree on the wording of a notice, and of the form to be enclosed therewith, to be given to all class members presently employed and included on the constructive seniority list, and to all class members laid off and not recalled and included on the constructive seniority list, and given upon completion of their probationary period to all class members hired in the future and included on the constructive seniority list. Failing agreement of

counsel, each party shall then submit a proposed letter and the court shall then decide upon its final form. The notice shall explain the purposes of a constructive seniority date, shall state the date of her first recorded application for employment with the defendants, shall state her constructive seniority date and the method of its calculation by plaintiffs, shall inform the employee of any contest by the defendants to her presumptive constructive seniority date and of its factual basis, shall briefly advise the employee of the benefit of a presumption in proving a claim, and shall advise the employee of her options which can be exercised by filling out the form enclosed therewith and sending it to counsel for plaintiffs within 30 days after provision of the notice to the class member. The options are:

(1) to assert her right to

the presumptive constructive seniority date as calculated;

(2) to seek an earlier constructive seniority date; or

(3) to accept the defendants' propcsed alternative constructive seniority date, if any.

The notice shall state that counsel for plaintiffs shall be available to answer inquiries at designated times and places. If the employee rejects the defendants' proposed date, the form shall request that she set forth any facts she may have available in response to the defendants' factual contentions. Copies of the forms reviewed by counsel for plaintiffs shall be provided to the defendants.

(d) Counsel for plaintiffs shall seek to obtain as many agreements as possible as to constructive seniority dates, but shall not have the right to compromise, without specific consent, the constructive

seniority date of any class member who has submitted the above-described form.

(e) Any remaining disputes as to each employee's constructive seniority date shall be resolved by the court.

(f) Constructive seniority shall be used for all purposes for which seniority is now used or may hereafter be used, including all competitive uses of seniority and all uses of seniority to determine entitlements to benefits.

11. Any class member who is entitled to constructive seniority under the provisions of paragraph 10 as result of discriminatory delay in her hire, and who has been laid off and not been recalled as of the effective date of this Decree, shall be recalled in accordance with her constructive seniority date and the plant or constructive seniority dates of the other employees laid off. The employees whose

seniority is to be compared are the employees in competition for recall with the class members in question.

12. The defendants shall designate an official who will have responsibility for securing compliance with this Decree, and such designated official shall review or supervise the processing of employment forms and applications.

13. The defendants shall post copies of this Decree in conspicuous locations throughout their plant.

14. Within 15 days after the end of each calendar quarter, the defendants shall file with the court a list of all persons promoted from one job category to another within the previous calendar quarter, including the name, race, sex, and old and new job titles and pay rates of each such employee. With this list, they shall also file a list of all initial assignments in

the calendar quarter, including the name, race, sex, job title and pay rate of each person initially assigned. Once each year following the entry of this Decree, the defendants shall file with the court a statement of the steps they have taken to comply with each of its provisions. Copies of such documents shall be served upon counsel for plaintiffs.

15. The provisions of this Decree apply only to the defendants' facility at Cleveland, Mississippi.

This, the 18th day of August, 1980.

/s/ Orma R. Smith,
Senior Judge
United States District Judge

Rule 23, F.R. Civ. P.

The pertinent provisions of Rule 23, F.R. Civ. P., are:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole....

* * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * *

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present

claims or defenses, or otherwise to come into the action;....

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Office - Supreme Court, U.S.
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CLERK

No. 82-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
Petitioners,

v.

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 1, 1982

QUESTION PRESENTED

Did the District Court abuse its discretion in this employment discrimination action by excluding black males from a class represented by black female named plaintiffs, where these plaintiffs alleged claims of both racial and sexual discrimination which created a conflict between the interests of black males and females, and where there was no named black male plaintiff to represent a subclass of black males and guard against the effects of this conflict?

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On March 2, 1972, Willie Mae Payne and Alma Jean Williams, both black females, and James Williams, a black male, filed a class action alleging race discrimination in respondents' ("Travenol") hiring, assignment, promotion and disciplinary practices. This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

On November 16, 1972, the District Court conditionally defined a class under Fed. R. Civ. P. 23 as follows:

> All present, past and future black employees and all past and future black applicants for employment at the facility operated by defendants, or either of them, at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black employees of defendants and all black applicants for employment at said facility, prior to March 3, 1970 are excluded from the class.

On May 1, 1973, the court granted plaintiffs' motion to amend the complaint to include allegations of sex discrimination. On May 3, 1973, James Williams, the sole male plaintiff, moved to withdraw from the action citing religious reasons, and was permitted to do so on May 8, 1973. On June 15, 1973, Delilah Cherry and Birdie Lee Griffin, both black females, moved and were thereafter allowed to intervene. Their complaint in intervention alleged discrimination on the bases of race and sex. At this point the named plaintiffs were four black females, alleging both race and sex discrimination.

Subsequent discovery brought out plaintiffs' specific grievances. Plaintiffs asserted in answers to interrogatories that Travenol discriminated racially against black males in hiring for the Material Handler position, and against black females in hiring for the Assembler and clerical positions. They charged that Travenol discriminated sexually against females by assigning them upon hire as Assemblers rather than as higher paid Material Handlers, by requiring new Material Handlers to perform the most physically demanding work—discouraging females from accepting the position—and by requiring that first-line supervisors (Group Leaders) have prior experience as Material Handlers.

On October 29, 1974, Travenol moved the District Court to redefine the class, *inter alia*, to exclude black males because there was a conflict between the interests of the black female plaintiffs and the black males they sought to represent arising from the sex discrimination claims. On November 11, 1974,

plaintiffs moved the District Court to expand the class to include white females.

The District Court denied plaintiffs' motion to add white females to the class, granted Travenol's motion, and redefined the class conditionally as follows:

> All present, past, and future black female employees and all present, past and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitation that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class.

(App. 170a.) 416 F. Supp. 248, 253. The court also ordered plaintiffs to give notice of the litigation and class definition to members of the redefined class. (App. 171a.) No notice had been sent previously.

A bench trial commenced on March 3, 1975. On February 19, 1976, the District Court issued a Memorandum of Decision containing findings that plaintiffs had proved discrimination in certain of Travenol's employment practices and not in others, and issued an injunction. (App. 173a.) The District Court finalized the class definition on December 8, 1976 (App. 207a, 222a, 74 F.R.D. 14), and iterated that its definition was final on January 24, 1979 (App. 233a).

Following Travenol's appeal to the Court of Appeals for the Fifth Circuit from the injunction (App. 225a), and this Court's denial of plaintiffs' subsequent petition for certiorari (439 U.S. 835), the District Court referred to a special master the remaining issues of additional injunctive relief and back

pay. The special master issued his report and decree following additional discovery and a hearing. The decree prohibits Travenol from discriminating subjectively on the basis of race and sex in hiring or promotion, and, by reference to the prior injunction, prohibits certain educational requirements. (App. 266a.) It requires Travenol to post notices of job vacancies, and to adhere to specified promotion procedures (App. 270a-272a), and it establishes procedures to provide rightful place relief to members of the class in the form of hiring priorities and constructive seniority (App. 268a).

The District Court overruled the parties' various objections and adopted the special master's report and decree. (App. 264a.) The parties each noticed an appeal to the Court of Appeals. Travenol challenged the form of the decree, and challenged the absence of factual findings requisite to the ultimate finding of discrimination in the District Court's February 19, 1976 Memorandum of Decision, upon which the decree was based. Plaintiffs appealed the District Court's denial of additional injunctive relief.

The Court of Appeals required several adjustments in the form of relief, and moved back the opening dates for membership in the class. It refused to overturn the District Court's exclusion of black males from the class, agreeing that the sexual discrimination claim "plainly draws the interests of males into conflict with the interests of females." (App. 28a-29a.)

Travenol petitioned for rehearing with regard to the Court of Appeals' finding that Travenol had discriminated in hiring. The court denied this petition, and on October 4, 1982, Travenol filed a petition for certiorari with this Court (No. 82-589). The Court of Appeals also denied plaintiffs' petition for rehearing and suggestion for rehearing *en banc* with regard to the class definition and other issues. (App. 166a.)

REASONS FOR DENYING THE PETITION

Plaintiffs contend that the Court of Appeals' affirmance of the exclusion of black males should be reviewed by this Court because the finding of a dispositive conflict is inconsistent with controlling law, because the departure of the sole male plaintiff was irrelevant under controlling law, and because the District Court should have sent notice to black males informing them of their exclusion from the class, even though they had never received notice of their conditional inclusion. Each of these contentions is incorrect. The class redefinition was mandated by precedent. Notice was not required and would have served no proper purpose. Plaintiffs have presented no questions warranting this Court's review.

I. THE EXCLUSION OF BLACK MALES IS MANDATED BY FED. R. CIV. P. 23(a)(4)

The District Court's exclusion of black males from the class was a proper exercise of discretion, consistent with the precedent of this Court, and mandated by the requirement of Fed. R. Civ. P. Rule 23(a)(4) that a class action be maintained only if "the representative parties will fairly and adequately protect the interests of the class." The black female named plaintiffs could not be deemed adequate representatives of black males because their allegations of sex discrimination created an irreconcilable conflict between their own interests and the interests of black males. The absence of a male named plaintiff eliminated the possibility of guarding against the effects of this conflict.

Adequate representation, indeed due process, requires that the interests of class representatives not be antagonistic to or in conflict with the interests of those they purport to represent. *Hansberry v. Lee*, 311 U.S. 32, 44-46 (1940). Thus, in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), this Court determined that the named plaintiffs were not appropriate class representatives because their demand for a merger of the city- and line-driver collective bargaining units and seniority lists conflicted with a vote against such a merger by members of the class. Similarly, in *General Telephone Co. v. E.E.O.C.*, 446 U.S. 318, 331 (1980), the Court stated:

> [T]he adequate representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.

The District Court correctly applied these principles when it modified the conditional class definition to exclude black males. The action was initially brought by two black females and a black male who alleged only racial discrimination. It was in this context that the District Court certified a class of black females and black males. Over a year later the two original female plaintiffs and two new female plaintiffs changed the entire character of the lawsuit by alleging sexual discrimination. With the withdrawal of the sole black male named plaintiff for religious reasons, only these black females remained to prosecute the race claims of males.

Travenol's subsequent discovery of plaintiffs' specific charges revealed a conflict between the interests of the black female plaintiffs and of black males. Plaintiffs charged racial discrimination against black males in hiring for the Material Handler position. They also charged that several practices relating to this position resulted in sexual discrimination against females: the assignment of females upon hire to Assembler rather than Material Handler, the requirement that new Material Handlers perform the most difficult tasks, and the requirement that first-line supervisors have experience as Material Handlers. Since the allegations of discrimination pertinent to placement of females in this position were sexual, the black female named plaintiffs could be expected to emphasize proof of sexual discrimination over race discrimination. Proof of sexual discrimination would result in constructive seniority relief for females at the expense of black males, whose race discrimination claims as to this position would have been discarded. Not only would the interests of black female

applicants thus conflict with those of black male applicants, but they would also conflict with those of black male employees who were hired after the black females had applied. By the same token, black females employed as Assemblers would have conflicting interests with black males employed as Material Handlers, both with respect to seniority if the females were to be placed in Material Handlers positions, and with respect to promotion to first-line supervision if they were not and thus continued to lack required experience.

Travenol presented this conflict to the District Court in a motion to redefine the class. As if to emphasize the importance of their sexual discrimination claims, plaintiffs moved to expand the class to include white females. The District Judge stated at oral argument:

> I think there is too much conflict between the males and the females in this situation for them to represent a class which would involve black males, or males of either race. There is a controversy in this case with reference to whether or not females should be permitted to be employed in the position of Material Handler in the plant, because they have always been assigned to and employed in the assembly part of the plant, and in that category which carries, as I understand it, a lower rate of pay. If these black female plaintiffs are going to get into a controversy with males, either white or black, then I don't think they can represent the male population of the plant so far as males or [sic] concerned . . . .

(App. 23a.) The District Judge granted Travenol's motion and denied plaintiffs' motion to include white females in the class. (App. 170a.)

Plaintiffs' contention that in affirming the exclusion of black males[1] the Court of Appeals relied on "abstract rules of thumb," inconsistent with this Court's recent ruling in *General*

[1] Plaintiffs did not appeal the District Court's refusal to include white females in the class.

Telephone Co. of the Southwest v. Falcon, ____ U.S. ____, 102 S. Ct. 2364, 2372 (1982), is baseless. The Court of Appeals and District Court based their conflict finding not on abstract rules, but on a factual analysis. The Court of Appeals stated:

> The conflict found by the district court here is straightforward: the female plaintiffs asserted that Travenol discriminates against females by typically assigning them to the lower-paying job of assembler while typically assigning males to the higher-paying job of material handler. The females, therefore, sought to establish that males were favored at their expense. This claim plainly draws the interests of males into conflict with the interests of females.

(App. 28a-29a.) The court continued in a footnote with the following quotation from *Colston v. Maryland Cup Corp.*, 26 F.R. Serv. 2d 940, 943 (D. Md. 1978):

> On the one hand, [the black female plaintiff] would argue that defendant's policies and practices discriminated in favor of males, including black males, and against females. At the same time, she would claim that defendant favored whites, including white females, over blacks. In light of these conflicting positions, plaintiffs would not be an adequate representative of either black males or white females.

(App. 29a.)

The conflict is real, not potential or abstract.[2] Indeed, its effects are revealed starkly by plaintiffs' contention here and in the Court of Appeals that black males have no "legally cognizable" interest in perpetuating sex discrimination in the

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[2] Plaintiffs do not fully describe the conflict in their Petition for a Writ of Certiorari. The conflict does not depend on "bumping" of incumbent male Material Handlers as they suggest. As plaintiffs concede, success on sexual discrimination claims requires "unhired black males and black male Custodians .... to compete with black women for future Material Handler positions." (*Petition*, p. 23.) They cynically decide this conflict themselves by pointing out that in return for this competition, some lower paying Assembler positions would be available to black males. They overlook, of course, the conflicts mentioned in the text at pages 6-7, *supra*.

Material Handler position. The Court of Appeals concluded correctly that, "Black males are entitled to a class representative who is free from a desire to prove a claim that will impair their interests." (App. 32a-33a.)

Plaintiffs contend more specifically that *Falcon* requires a balancing of common interests on the one hand with the conflict on the other, and that if the balance favors common interests the conflict should be ignored. (*Plaintiffs' Petition for Writ of Certiorari* ("*Petition*"), p. 11.) *Falcon* suggests no such thing. *Falcon* specifically did not treat the defendant's contention that the interests of the employee plaintiff conflicted with the interests of the rejected applicants the plaintiff sought to represent. 102 S. Ct. at 2371 n.13. The Court was not required to reach this contention because the plaintiff's claims did not satisfy the Rule 23 requirements of commonality and typicality. It rejected the Court of Appeals' presumption that discrimination claims by their nature require common proof, and are typical of all other discrimination claims—the bases for "across-the-board" actions. The Court ruled that a class should be certified only after a "vigorous analysis" shows satisfaction of Rule 23(a). 102 S. Ct. at 2373.

By way of example the Court pointed out that if,

> [an employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the *commonality* and *typicality* requirements of Rule 23(a).

102 S. Ct. at 2371 n.15 (emphasis added). Similarly, the Court noted, subjective decision-making in hiring and promotion could justify a class of both applicants and employees. *Id.* But this language does not mandate a balancing of common interests with a conflict, as plaintiffs contend. The analysis in the footnote is limited to determining commonality and typicality. It says nothing about whether an employee can represent applicants in light of a conflict, and this Court's language

in *General Telephone Co. v. E.E.O.C.*, *supra*, 446 U.S. at 331, states that he cannot.[3]

Plaintiffs' emphasis on commonality and typicality among *some* of the respective claims of black females and black males in this action begs the question of what to do about an actual conflict arising from other claims. Their argument that commonality and typicality should outweigh the conflict would discard the requirement of adequate representation. Surely *Falcon* does not support this result.[4]

Plaintiffs' further contention that *Falcon* supports a balancing of "the risk of harm to black males caused by their inclusion with the harm black males would suffer by exclusion" (*Petition*, pp. 12-13) also is without a basis in the decision. The Court of Appeals determined correctly that, "[Plaintiffs'] argument diverts attention from the proper inquiry under Rule 23." (App. 33a.) The question the District Court had to decide was not what class definition would most benefit black males, but whether black males would be adequately represented and thus fairly bound to a judgment—win or lose. *See id.*

In any event, black males suffered no harm by their exclusion. They were free in the early stages of the litigation to intervene and seek an expansion of the class, and were free within the limitations period to commence separate actions. But none came forward, and plaintiffs now urge harm because

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[3] The Court of Appeals in the instant case noted that in "across-the-board" class actions employees often represent applicants and that "Title VII policies support a broad reading of Rule 23 ...." (App. 27a-28a.) Yet, despite this broad reading (which is inconsistent with *Falcon*) the court still found a conflict here.

[4] Plaintiffs similarly misconstrue the language in *Falcon* that weight should be given to whether "adjudication of [a] claim of discrimination in promotion would require the decision of any common questions concerning [hiring]" 102 S. Ct. at 2371, and to considerations of "efficiency and economy of litigation." 102 S. Ct. at 2372. (See *Petition*, p. 14.) This language also refers to the requirements of commonality and typicality, and does not suggest that a failure of adequate representation should be balanced out of the picture.

black males are not reaping rightful place relief from a litigation of which they are not a part.[5]

Plaintiffs' collateral contention that the District Court should have reevaluated the class definition after trial in light of the female plaintiffs' purported "adequate representation" of black males (*Petition*, pp. 16-18) fails to recognize when the conflict question must be decided. The Court of Appeals stated:

> We reject this argument. It is true that the court's responsibility to assess the adequacy of representation is an ongoing one. The district court may decertify a class after trial if plaintiff's trial performance showed him or her to be an inadequate class representative .... But the trial court is not required to hypothesize about the effect of an actual conflict of interests on the adequacy of plaintiffs' representation. It is enough to deny representation that the conflict is actual at the outset of the trial.

(App. 31a-32a.)

The *post hoc* hypothesizing plaintiffs seek would be inconsistent with *Falcon*: "We do not, of course, judge the propriety of a class certification by hindsight." 102 S. Ct. at 2372. Further, post-trial redefinition would deny a defendant its due process right to know against what it must defend. A class definition delimits the issues. Whatever case plaintiffs made in this litigation on behalf of black males was gratuitous; Travenol was not required to defend against it. The issues and liability cannot fairly be expanded after trial by the addition of a new category of class members.

Plaintiffs have not pointed to court of appeals precedent inconsistent with the District Court's exercise of discretion and the Court of Appeals' affirmance. In *Donaldson v. Pillsbury Co.*, 554 F.2d 825 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977), upon which plaintiffs rely, the Court of Appeals did not consider possible conflicts between the plaintiff and the class

[5] Black males do benefit from injunctive relief prohibiting racial discrimination.

she sought to represent. The question before the court was typicality.

Nor do the three cases plaintiffs cite involving representation of classes by collective bargaining representatives conflict with the holding here.[6] None of these cases involved the stark conflict between race and sex claims present in this action. Moreover, the unions in these cases were required to represent the interests of all employees under the scheme of federal labor laws, which "embodies the principles of nondiscrimination as a matter of highest priority . . . . " (*Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 65 (1975)), and which establishes their duty of fair representation (*Vaca v. Sipes*, 386 U.S. 171 (1967)). Individual litigants hold no comparable legal status.

II. *FRANKS v. BOWMAN TRANSPORTATION CO.*, AND *ALBEMARLE PAPER CO. v. MOODY*, DO NOT REQUIRE CERTIFICATION OF A BROADER CLASS

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), do not require an expansion of the class to accommodate the salutory purposes of Title VII, as plaintiffs urge. (*Petition*, pp. 30-32.) Plaintiffs' contention that these cases require a broad reading of Rule 23 in Title VII actions is disposed of by the holding in *Falcon* that the Rule applies with complete force to these actions. Moreover, the Court of Appeals applied a broad reading here because of the Title VII context, and affirmed the District Court's exercise of discretion.

Franks and *Albemarle* do establish that proper parties who have proved discrimination are entitled to a complete remedy. But black males were not party to these proceedings.

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[6] Plaintiffs rely on *Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268-69 (4th Cir. 1981); *Int'l Woodworkers of America v. Georgia-Pacific Corp.*, 568 F.2d 64, 67-68 (8th Cir. 1977); and *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979). (*Petition*, pp. 28-29.)

III. THE ABSENCE OF A BLACK MALE NAMED PLAINTIFF PRECLUDED CERTIFICATION

Plaintiffs' contention that the departure of the sole male plaintiff did not make the claims of black males moot (*Petition*, pp. 36-38) misses the point. Black males were excluded not because their claims were moot, but because the named plaintiffs could not adequately protect their interests. While pre-existing class certification may satisfy the case or controversy requirement after the subsequent departure of the named plaintiff (*Sosna v. Iowa*, 419 U.S. 393 (1975)), it does not permit, let alone mandate, continued representation of a segment of the class by remaining named plaintiffs who cannot represent that segment adequately. A case or controversy does not satisfy Rule 23.

The absence of a named black male plaintiff made continued inclusion of black males in the class improper because it eliminated the possibility of reducing the conflict by subdividing the class. As the Court of Appeals stated:

> Ordinarily, if a court discerns a conflict like the one in this case, the proper solution is to create subclasses of persons whose interests are in accord. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). Of course, each subclass must be headed by a person who claims the same injury as the subclass, but who lacks the fatal conflict. *See East Texas Motor Freight System, Inc. v. Rodriguez, supra; Johnson v. American Credit Co.*, 581 F.2d 526, 532-33 (5th Cir. 1978). In this case, after the sole black male plaintiff, James Williams, withdrew from the case, no named plaintiff existed to head a class of black males.

(App. 34a-35a.)[7]

Plaintiffs' related argument that the District Court was required to give notice to black males of their exclusion from

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[7] Subclassification without a subclass head for black males could do nothing to alleviate the conflict. A District Court is not to substitute itself for a named plaintiff and supervise the plaintiff's case to ensure against the results of a conflict, as plaintiffs suggest. (*Petition*, p. 38 n.2).

the class under Rule 23(e) is equally without merit.[8] Neither the May 1973 withdrawal of plaintiff Williams nor the December 1974 redefinition of the class was an event triggering the approval and notice provisions of Rule 23(e). These provisions are designed to prevent a plaintiff from selling out the class by entering into a collusive settlement with the defendant, as Judge Goldberg recognized in his dissent. (App. 153a n.22.) To this end, the rule requires that a court review and approve any "dismissal" or "compromise," and give notice to the class of the proposed terms. The notice serves this review by assuring that class members understand the proposed settlement and have an opportunity to submit their views to the court. *See generally,* 3B J. Moore, *Federal Practice* ¶ 23.80[3] (1982).

The purpose of the rule has no bearing when rights are not determined. The May 1973 withdrawal of plaintiff Williams did not determine rights of black males or remove them from the class. Indeed, they remained in the class for the next year and a half while defendant conducted discovery which revealed that their continued inclusion would be improper. Williams' withdrawal could not be considered a dismissal or compromise of the class claims within Rule 23(e). *See Zeffiro v. First Pennsylvania Banking & Trust Co.,* 82 F.R.D. 31 (E.D. Pa. 1979) (cited by Judge Goldberg; withdrawal of one of three named plaintiffs does not trigger Rule 23(e) notice requirement).[9]

The District Court's exclusion of black males in December 1974 also did not determine any rights of black males. They remained free to pursue any claims they may have had by other procedural means. A court notice would have served no

[8] It is perhaps worth noting that this argument was not discussed in the main brief.

[9] Plaintiffs' determination in May 1973 to allege sex discrimination and create the conflict had as great an impact on the continued inclusion of black males as the withdrawal of Mr. Williams. Plaintiffs do not contend that notice should have been sent of these allegations because, like the departure of Mr. Williams, they had no impact until the December redefinition.

purpose beyond soliciting a new black male named plaintiff—plaintiffs' stated reason for a notice. (App. 148a n.17.) The Court of Appeals correctly rejected this unseemly judicial role. (App. 37a.)[10]

Nor was notice required as a matter of discretion under Rule 23(d)(2). Black males would not have relied to their detriment on their conditional inclusion in the class because they were given no notice of it. Their knowledge of the action cannot be presumed (*see generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974)), and such a presumption would require the further presumption that they knew of their exclusion. This Court rejected such presumptions implicitly in *Falcon*, where it stated that a class certification order "particularly during the period before any notice is sent to members of the class, 'is inherently tentative.' " *General Telephone Co. of the Southwest v. Falcon*, *supra*, 102 S. Ct. at 2372, *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978). In the absence of any facts showing reliance, the Court of Appeals correctly held that the District Judge properly exercised his discretion not to require notice. (App. 39a.)

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[10] Whether the narrowing of the class definition was a "dismissal" within Rule 23(e) is beside the point in any event. The rule provides for notice "in such manner as the court directs. . . ." "[T]his language is sufficiently flexible to permit a court to approve a dismissal, but to determine that no notice at all is required, where the dismissal will not result in any prejudice to the class." 3 H. Newberg, *Class Actions* § 4950 (1977). *See Bantolina v. Aloha Motors, Inc.*, 75 F.R.D. 26 (D. Hawaii 1977); *Berse v. Berman*, 60 F.R.D. 414 (S.D.N.Y. 1973).

The cases cited in Judge Goldberg's dissent do not support his contention that notice must be sent whenever a class is narrowed or a plaintiff withdraws. (App. 152a-153a n.20.) In *McArthur v. Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977), *vac. on other grounds*, 569 F.2d 276 (5th Cir. 1978), the class claims were dropped as part of a settlement agreement. 556 F.2d at 303. In *Ross v. Warner*, 80 F.R.D. 88 (S.D.N.Y. 1978), and *Turoff v. Union Oil Co. of California*, 61 F.R.D. 51 (N.D. Ohio 1973), the courts concluded that notice was required because the extensive publicity given to the cases would have caused the excluded class members to rely detrimentally on the class action. There is no similar record or contention here.

CONCLUSION

For the reasons stated above the petition should be denied.

Respectfully submitted,

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